2016 Spring Elder Law Institute

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Presenter Biographies

Kristen M. Lewis practices law at Smith, Gambrell & Russell in Atlanta, Georgia. She is a Fellow of the American College of Trust and Estate Counsel and is nationally recognized for her expertise in special needs trust planning for persons challenged by disabilities. She is an active member of the Special Needs Alliance, the Academy for Special Needs Planners, the National Academy of Elder Law Attorneys, the American Bar Association, the New York Bar Association Elder Law Section and the State Bar of Georgia Fiduciary Law Section. Lewis received her B.A. in French and Political Science with honors from Wellesley College in 1981. She earned her J.D. from Cornell Law School in 1984. She is admitted to practice law in New York and Georgia.

Joan Schofield, a registered nurse, has held many healthcare management positions in hospital administration and management of large physician practices. Since 1992, she has worked as a nurse case manager specializing in catastrophic injury care coordination. She operates MedView, an independent practice which has provided case management, life care planning and legal nurse consulting services since 1996. She is one of the founding members of the American Association of Nurse Life Care Planners established in the mid-1990s and helped launch professional association. She co-authored the book *Scope and Standards of Practice in Nurse Life Care Planning,* and authored the chapter on *Life Care Planning across the Life Span* in the Nurse Life Care Planning core curriculum textbook. She has a particular interest in analyzing how injuries affect individuals and their families across the continuum of life and has been providing catastrophic injury case management and life care planning services across the Southwest for the past 20 years. She holds a Bachelor of Science in Nursing and a Master of Business Administration and is certified by the Certified Nurse Life Care Planner Certification Board.

Johanna Pickel is the sole shareholder of Johanna A. Pickel, LLC, serving clients in Sandoval, Bernalillo, Valencia and Santa Fe counties. Her current practice is focused on elder law, estate planning, probate, estate and trust administration, guardianships and conservatorships and business planning. She earned her B.A. from the University of Montana, M.A. from New Mexico State University, J.D. from the University of New Mexico School of Law and LL.M from the Western New England School of Law.

Nell Graham Sale is a partner of the law firm of Pregenzer, Baysinger, Wideman & Sale in Albuquerque. She is admitted to practice law in New Mexico, Delaware, Pannsylvania, U.S. Tax Court and the U.S. Supreme Court. Sale has an AV Preeminent rating for LexisNexis Martindale-Hubbell and has been selected for inclusion in *Super Lawyers* and *Best Lawyers in America* for several years. She is a certified Elder Lawyer as designated by the National Foundation for Elder Law. She is a member and former board member of the Special Needs Alliance, a national network of disability trust lawyers. She is a fellow in the American College of Trust and Estate Counsel. She received the 2012 award from the Albuquerque Community Foundation for Excellence in charitable gift planning. She also received the 2012 XLW Pinnacle award from the State Bar of New Mexico, receiving the highest ratings for speaking at CLE programs. Her law practice concentrates on taxation, estate planning, estate administration, business succession, disability planning and elder law.

SPECIAL NEEDS TRUSTS: PLANNING FOR BENEFICIARIES WITH SPECIAL NEEDS

By

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Kristen M. Lewis practices law with Smith, Gambrell & Russell, LLP in Atlanta, Georgia. Ms. Lewis is a nationally recognized expert on "Special Needs Trust" planning for persons challenged by disabilities, and is a frequent speaker and author on this topic. She is a Fellow of the American College of Trust and Estate Counsel. She is also an active member of the Special Needs Alliance, the Academy of Special Needs Planners, the National Academy of Elder Law Attorneys, the State Bar of Georgia Fiduciary Law Section, and the Georgia Planned Giving Council. She recently completed her tenure as Co-Chair of the Long-Term Care, Medicaid and Special Needs Trusts Committee of the Elder Law, Disability Planning and Bioethics Group of the Real Property, Probate and Trust Law Section of the ABA. In her free time, she trains certified service dogs for Canine Assistants, based in Milton, Georgia.

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Ms. Lewis co-authored an article entitled, "Top 15 Tips for Estate Planners When Planning for Special Needs," published in *Probate & Property*, Volume 24, Number 2, March/April 2010, which won the magazine's 2010 Excellence in Writing Award for "Best Overall Article - Trusts & Estates." She most recently authored an article entitled, "The Crime of the 21st Century: Financial Abuse of Elders," which was published in *Probate & Property*, Volume 28, Number 4, July/August 2014.

SPECIAL NEEDS TRUSTS:
PLANNING FOR BENEFICIARIES WITH SPECIAL NEEDS

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This outline will review the various types of Special Needs Trusts that serve as the cornerstone for securing the future of persons challenged by disabilities; the types of government benefits and programs that can be accessed and preserved with proper Special Needs Trust planning; and the most common challenges (and solutions) encountered in Special Needs Trust planning. The program discussion will also include a review of the specimen Special Needs Trust Agreements included in the Appendix materials.

I. THE "SPECIAL NEEDS" OF PERSONS WITH DISABILITIES

A. The scope of the population with disabilities

1. There are an estimated **one billion people with disabilities** in the world, according to a 2011 report published by the World Health Organization. *See* World Health Organization & World Bank Group, "World Report on Disability" (2011).[1] This represents 15% of the world's population. Thus, it is not an overstatement to conclude that "Everyone knows someone with a disability." The *International Classification of Functioning, Disability and Health* uses the term "disability" as an umbrella for impairments, activity limitations and participation restrictions. A report issued by the United States Census Bureau concluded that in 2010, approximately **56.7 million of the 303.9 million people in the U.S. civilian non-institutionalized population, representing 18.7% of this group**, reported a disability. *See* Matthew W. Brault, "Americans With Disabilities: 2010," *Current Population Reports*, P70-131, U.S. Census Bureau, Washington, D.C., Issued July 2012 (available at www.census.gov/hhes/www/disability/sipp/disable10.html (last visited August 10, 2012)). Another 4.1 million institutionalized people (*i.e.* in correctional institutions or nursing homes) have disabilities, but were not included in the Brault report.

a. The Brault report divided the universe of disabilities into (i) seeing, hearing and speaking limitations, (ii) upper and lower body limitations, (iii) cognitive, mental and emotional functioning limitations, and (iv) difficulties with "Activities of Daily Living" or "Instrumental Activities of Daily Living." Persons age 15 and older with disabilities in these categories were further assigned to one of three "disability domains."

(1) "Communicative" disabilities, including blindness; visual impairments; deafness; hearing impairments; difficulty having speech understood.

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[1] http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf.

(2) "Mental" disabilities, including learning disabilities; intellectual disabilities; developmental disabilities; Alzheimer's disease, senility or dementia; another mental or emotional condition that seriously interferes with everyday activities.

(3) "Physical" disabilities, including required use of a wheelchair, cane, crutches or walker; difficulty walking a quarter of a mile, climbing one flight of stairs, lifting a 10 pound object, grasping objects or getting out of bed; activity limitations caused by arthritis or rheumatism; back or spine problems; broken bones or fractures; cancer; cerebral palsy; diabetes; epilepsy; head or spinal cord injury; heart trouble or atherosclerosis; hernia or rupture; high blood pressure; kidney problems; lung or respiratory problems; missing limbs; paralysis; stiffness or deformity of limbs; stomach or digestive problems; stroke; thyroid problems; tumor, cyst or growth. Brault report, at 2.

b. Another recent report issued by the U.S. Census Bureau, and also authored by Matthew W. Brault, analyzed school-aged children with disabilities. Of the 53.9 million **school-age children** (aged 5 to 17) in the U.S. civilian non-institutionalized population, 2.8 million, or **5.2%, were reported to have a disability** in 2010. *See* Matthew W. Brault, "School-Aged Children With Disabilities in U.S. Metropolitan Statistical Areas: 2010," *American Community Survey Briefs*, U.S. Census Bureau (Nov. 2011).[2]

(1) That report incorporates the definition of "child with a disability" set forth in the **"Individuals with Disabilities Education Act" of 2004 ("IDEA")**, 20 U.S.C. §§ 1400-1482, which includes a child who has "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; and who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A).

(2) In April 2016, the Centers for Disease Control and Prevention issued a report which included a finding that the prevalence of **Autism Spectrum Disorder ("ASD") has risen to 1 in every 68 births** in the United States. ASD is 4.5 times more common among boys (1 in 42) than among girls (1 in 189). *See* Christensen DL, Baio J, Braun KV, et al. "Prevalence and Characeristics of Autism Spectrum Disorder Among Children Aged 8 Years – Autism and Developmental Disabilities Monitoring Network, 11 Sites, United States, 2012."[3]

B. The "special needs" of persons with disabilities

1. The term **"special needs" has no universally accepted definition**, but this author uses the term to refer to the broad consequences of a person's disabling condition and the resultant life circumstances, challenges and opportunities that ensue therefrom. These needs can range from intensely personal physical requirements, to the consequences of a person's inability to secure employment and wages sufficient to be self-supporting, to occasions for improving the quality of life of the person with the disability. The term thus necessarily means something different for each person with a disabling condition.

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[2] http://www.census.gov/prod/2011pubs/acsbr10-12.pdf.

[3] http://www.cdc.gov/mmwr/volumes/65/ss/ss6503a1.htm.

a. However, the Medicaid programs of various States are increasingly attempting to limit the scope of the term "special needs" to those that are related solely to the "treatment" of a person's disability. *See, e.g., Lewis v. Alexander*, 685 F.3d 325, 334-35 (3d Cir. 2012). The Court in that decision held that such attempted limitations on the types of "special needs" that can be funded by a Special Needs Trust are constitutionally impermissible and preempted in light of Congress's intent in enacting the federal legislation that blesses the broader use of Special Needs Trusts, as described in Section III, *infra*.

2. Providing appropriately for the special needs of persons with disabilities has emerged as a challenging and complex multidisciplinary task over the past twenty years. Estate planning attorneys and allied professionals have an insatiable appetite for knowledge and direction in this emerging area. Even law students still roaming the hallowed halls of the country's law schools are increasingly eager for academic training in "elder law" and special needs planning. Nevertheless, there are still vast numbers of attorneys and allied professionals who know "just enough to be dangerous" about how best to address the myriad needs of families trying to secure the future of their loved ones with disabilities. This outline will highlight the major challenges, and solutions, which attorneys and allied professionals typically encounter when advising clients with special needs issues.

II. DO NOT DISINHERIT THE BENEFICIARY WITH SPECIAL NEEDS

A. Disinheritance is an outdated and incorrect approach

1. Estate planners who recommend the disinheritance of a beneficiary with a disabling condition often do so because they are unfamiliar with Special Needs Trust planning. Although they have a vague understanding that it is inadvisable for a variety of reasons to make an outright gift or bequest to a person with a disability, many traditional estate planning professionals are reluctant to develop new expertise in this complex emerging area of the law. Rather than developing a proficiency in this area, or aligning themselves with co-counsel who can provide the necessary expertise, they recommend that the beneficiary with special needs be disinherited and provided for informally by other family members, typically adult siblings.

a. Estate planning attorneys are increasingly held liable for legal malpractice for their lack of proper advice on how best to address the special needs of a beneficiary with a disability. *See, e.g., Board of Overseers of the Bar v. Brown*, Maine Supreme Court Docket No. Bar-01-6 (Oct. 25, 2002).[4]

B. Do not leave the share of the person with special needs to another family member

1. Able-bodied family members may claim that they are willing and able to manage on an informal basis the funds designated for the beneficiary with special needs. However, such a **precatory arrangement** cannot typically be legally enforced. The donee of the funds could maliciously withhold the benefits of the designated funds from the intended beneficiary, leaving the beneficiary with no legal recourse (and no funds to pursue any remedies).

[4] http://www.courts.state.me.us/opinions_orders/opinions/documents/Bar-01-6%20Brown.htm.

a. Even **well-intentioned** family members may ultimately fail to manage designated funds for the benefit of the intended beneficiary with special needs.

(1) If the donee of the designated funds **commingles the assets** with his own, and thereafter (i) files for bankruptcy, (ii) becomes party to a divorce proceeding and a subsequent equitable division of property, or (iii) fails to pay his tax liabilities and becomes subject to a tax lien, the funds designated informally for the beneficiary with special needs could be dissipated entirely. These are but a few of the most **common creditor traps** that defeat the intention of clients trying to secure the future of beneficiaries with special needs.

(2) A similar result could ensue if the donee of the funds set aside informally for the beneficiary with special needs **predeceases** him and (i) dies intestate with heirs-at-law that include persons other than the intended beneficiary, or (ii) dies testate but fails to make proper arrangements in the Will for the ongoing management of the funds for the benefit of the intended beneficiary. Since an estimated 65% of the population dies intestate, this is another very common flaw in a client's plans to provide for beneficiaries with special needs.

III. SPECIAL NEEDS TRUSTS ARE THE CORNERSTONE OF PLANNING FOR A BENEFICIARY WITH A DISABILITY AND RESULTANT SPECIAL NEEDS

A. Types of Special Needs Trusts

1. The universe of Special Needs Trusts can be divided into two main categories: **"first-party" (also sometimes referred to as "self-settled")** Special Needs Trusts (*i.e.* funded with assets belonging to the beneficiary, or to which the beneficiary is legally entitled), and **"third-party"** Special Needs Trusts (*i.e.* funded with assets derived from someone other than the beneficiary).

a. For purposes of drafting Special Needs Trusts, the term "special needs" is often used interchangeably with the terms "supplemental needs" or "supplemental care." Advisors and planners differ widely in their usage of these terms, and there is no generally accepted "best practice" in this regard. As will be discussed below, whichever term is chosen must be **contrasted with providing for the beneficiary's "support" and "maintenance."**

b. The vast majority of Special Needs Trusts are **designed to preserve the beneficiary's eligibility for the various "means-tested" government benefit** programs for which a person with disabilities may qualify (discussed in Section IV, *infra*). The author often uses the term "Supplemental Care Special Needs Trust" to refer to this type of trust. In contrast, a Special Needs Trust could also theoretically be drafted as a "Support Special Needs Trust," but doing so would render the beneficiary ineligible for such "means-tested" programs. Consequently, this outline is devoted to a discussion of how Supplemental Care Special Needs Trusts serve as the cornerstone of securing the future of beneficiaries with special needs.

B. First-Party Special Needs Trusts

1. As part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA '93"), Congress specifically authorized the creation of a single-beneficiary Special Needs Trust to be

funded with assets belonging to the beneficiary, the statutory requirements for which are set forth in 42 U.S.C. § 1396p(d)(4)(A). While several States have statutory provisions that parallel the federal statute authorizing first-party Special Needs Trusts, most do not.

a. In addition to this federal statute, there are two additional primary sources of guidance regarding the validity and effectiveness of Special Needs Trusts: (i) the Social Security Administration **Program Operations Manual System (referred to hereinafter as "POMS")**, and (ii) the various State Medicaid Manuals. The vast majority of POMS provisions relevant to Special Needs Trusts are set forth in POMS SI 01120.200, 01120.201 and 01120.203 (included in the Appendix). The POMS are also available on-line at http://policy.ssa.gov. The United States Supreme Court, in *Washington State Department of Social & Health Services v. Guardianship of Keffler*, stated that the POMS "warrant respect." 537 U.S. 371, 385 (2003). A federal district court also recognized and reiterated the proposition that "[a]lthough the POMS is a policy and procedure manual that employees of the Department of Health & Human Services use in evaluating Social Security claims, and does not have the force and effect of law, it is nevertheless persuasive." *Davis v. Secretary of Health and Human Services*, 867 F.2d 336, 340 (6th Cir. 1989). Thus, practitioners **ignore the POMS at their peril.**

2. The **federal statutory requirements, and related POMS provisions, for a first-party Special Needs Trust** include the following.

a. The trust is established by (*i.e.* through the actions of) a permissible Settlor, including (i) the legal Guardian of the Property or Conservator of the beneficiary, *e.g.* in the case of a minor or an incapacitated adult who meets the relevant threshold under State law for the appointment of a Guardian or Conservator; (ii) a parent or grandparent of the beneficiary; or (iii) a court. Thus, under current Federal law, the beneficiary cannot establish a first-party Special Needs Trust for himself, even if he is otherwise mentally competent to do so under relevant State law. (N.B. "The Special Needs Trust Fairness Act of 2015" (Senate Bill 349), currently pending in the 114th Congress, would allow a mentally competent beneficiary to establish his own first-party Special Needs Trust.)

(1) Notwithstanding the unambiguous provisions of the federal enabling statute regarding the authority of "a parent or grandparent" to establish a first-party Special Needs Trust, the Social Security Administration has taken the position that a parent or grandparent **must also have *independent legal authority*** over the beneficiary's assets, *e.g.* as a court-appointed Conservator. *See* POMS SI 01120.203.B.l.g. **Absent such authority**, a parent or grandparent may also establish the trust as a **"seed trust,"** which is funded with a nominal amount of their own funds, to which may be added the assets belonging to the beneficiary. *See* POMS SI 01120.203.B.1.f.

(2) Since the beneficiary is not authorized to establish his own first-party Special Needs Trust under current law, the Social Security Administration takes the position that **a mere "agent" of the beneficiary** similarly may not serve as the Settlor. *See* POMS 01120.203.B.1.g. Thus, for example, a person serving as attorney-in-fact under a Power of Attorney (which is governed by agency principles) may not establish a first-party Special Needs Trust for the benefit of the principal. *Id.*

(3) In the case of a first-party Special Needs Trust established through the actions of a court, the creation of the trust must be ***required*** **by a court order**, not merely approved. *See* POMS 01120.203.B.1.f. Furthermore, a recent announcement from the Social Security Administration (dated May 28, 2015) indicates that the creation of the trust cannot have been completed before the court order is issued. "Court approval of an already created special needs trust is not sufficient . . . The court must specifically either establish the trust or order the establishment of the trust."

b. The beneficiary of the trust is "disabled" within the meaning of the Social Security Act, 42 U.S.C. § 1382c(a)(3), *i.e.* unable to engage in any **substantial gainful activity ("SGA")** by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death, or which has lasted, or can be expected to last, for a continuous period of not less than twelve months. *See* 20 C.F.R. § 416.905. If the beneficiary is under the age of 18, "disability" is defined as a medically determinable physical or mental impairment, or combination of impairments, that causes **marked and severe functional limitations**, and that can be expected to cause death, or that has lasted, or can be expected to last, for a continuous period of not less than twelve months. *See* 20 C.F.R. § 416.906. However, if such a minor is able to engage in SGA, he will not meet the definition of disabled.

(1) For 2016, the **income threshold** evidencing a person's ability to engage in SGA is $1,130/month. For a person who is blind, the SGA threshold is $1,820 in 2016. *See* U.S. Social Security Administration, Cost-of-Living Adjustment (COLA).[5] For purposes of a determination of SGA, a person's gross earnings excludes (i) unreimbursed out-of-pocket "impairment related work expenses" (*e.g.* attendant services, modifications to a vehicle used to transport the person to work, *etc.*), and (ii) the value of any work subsidies or support.

c. The trust is irrevocable and for the *sole benefit* of the beneficiary.

(1) While the federal enabling statute does not expressly require a first-party Special Needs Trust to be irrevocable, both the Social Security Administration and State Medicaid programs **require irrevocability**. *See, e.g.*, POMS SI 01120.201.D.1 and SI 01120.203.D.1, Step 7.

(2) While the federal enabling statute uses only the phrase "for the benefit of" the beneficiary, the States and the Social Security Administration have effectively required that **a stricter "sole benefit" standard** be utilized when evaluating Special Needs Trusts. *See, e.g.*, POMS SI 01120.203.B.1.e. This "sole benefit" requirement derives from the "asset transfer rules" which apply to persons who transfer assets as a way of qualifying for means-tested government benefits, including Supplemental Security Income and Medicaid, discussed *infra* in Section IV. The transfer of a person's assets to a first-party Special Needs Trust is exempt, and not subject to a transfer penalty, only if the trust is "solely for the benefit" of the trust beneficiary. *See* 42 U.S.C. § 1382b(c)(1)(C)(ii)(IV) and § 1396p(c)(2)(B)(iii) and (iv). Thus, POMS SI 01120.203.B.1.e and SI 01120.203.D.1, Step 3, assert the position of the Social Security Administration that the "sole benefit" standard applies to first-party Special

[5] http://www.socialsecurity.gov/news/press/factsheets/colafacts2016.pdf.

Needs Trusts, notwithstanding the contrary language of the federal enabling statute. The concept of "sole benefit" is further defined in POMS SI 01120.201.F.2, and currently constitutes a major battleground for those who draft and administer Special Needs Trusts.

d. The beneficiary is under age 65 when the trust is established and funded with the beneficiary's assets.

(1) If the trust was established prior to the date that the beneficiary attains age 65, the trust continues to qualify even after he attains age 65. *See* POMS SI 01120.203.B.1.b.

(2) However, it is **not permissible to make additions** to, or augmentations of, a first-party Special Needs Trust after the beneficiary attains age 65. This does not include interest, dividends or other earnings on trust principal deposited prior to the beneficiary's 65th birthday. Similarly, annuity payments to a first-party Special Needs Trust pursuant to an irrevocable assignment to the trust prior to the beneficiary's 65th birthday will not constitute "additions" even if the payments continue after age 65. *See* POMS SI 01120.203.B.1.c.

e. Upon the death of the beneficiary (or other termination event), medical assistance providers (*i.e.* **Medicaid,** but not the Social Security Administration) **will be reimbursed** up to the total amount of medical assistance benefits paid on behalf of the beneficiary under a State Medicaid plan during his lifetime.

(1) This last statutory requirement has resulted in the often-used monikers of **"Payback Trust"** or **"Medicaid Payback Trust"** for a first-party Special Needs Trust authorized by 42 U.S.C. § 1396p(d)(4)(A). Such Special Needs Trusts are also often called **"(d)(4)(A) Trusts."**

(2) Courts were initially split regarding the scope of the "total amount" that must be paid back to Medicaid. *See, e.g., In the Matter of Ruben N.,* 55 A.D.3d 257 (App. Div., 2d Dept. 2008), which initially held that Medicaid should be paid back only for assistance paid after the Special Needs Trust was established. *In the Matter of Abraham XX, Deceased v. State of New York,* 11 N.Y.3d 429 (2008), next held that Medicaid should be reimbursed for assistance paid even before the Special Needs Trust was established. Subsequently, the earlier opinion and order in *Ruben N.* were recalled and vacated, citing *Abraham XX,* allowing the State to recover the **cost of care provided over the course of the plaintiff's entire lifetime**. *In the Matter of Ruben N.,* 71 A.D.3d 897 (App. Div., 2d Dept. 2010).

(3) Provisions of the Social Security Administration's POMS issued after the decisions noted above take the position (not surprisingly) that Medicaid's payback **"cannot be limited to the period after the establishment of the trust."** *See* POMS SI 01120.203B.1.h.

(4) In the **context of a personal injury claim** that yields a recovery (verdict or settlement) for the beneficiary of a (d)(4)(A) Special Needs Trust, before the trust can be funded, Medicaid must first be reimbursed for those medical benefits paid prior to the establishment of the trust for medical care necessitated by the wrongful acts that generated the recovery. However, this **"pre-trust lien"** may be satisfied only from that portion of the

recovery that is specifically allocable to past medical expenses and costs. *See Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268 (2006).

(a) Congress legislatively overruled the *Ahlborn* decision in § 202(b) of the BIPARTISAN BUDGET ACT OF 2013 (Joint Resolution, 113th Congress, H.J. Res. 59; Public Law No. 113-67), effective October 1, 2014. However, implementation has been delayed twice, most recently by § 220 of the MEDICARE ACCESS AND CHIP REAUTHORIZATION ACT OF 2015 (U.S. House, 114th Congress, H.R. 2; Public Law No. 114-10, § 220, 129 Stat. 87, 154 (2015)), delaying implementation through October 1, 2017.

(5) If a first-party Special Needs Trust will terminate prior to the actual death of the beneficiary, POMS SI 01120.199.F.1. sets forth the following requirements for approved **"early termination"** provisions: (i) the Medicaid payback is satisfied after payment of certain allowable trust administrative expenses (*i.e.* state or federal taxes due as a consequence of the termination of the trust, and reasonable fees and expenses associated with the termination of the trust); (ii) the beneficiary (and no other entity or person) receives all remaining trust funds; and (iii) the power to terminate the trust early is held by someone other than the beneficiary.

(6) The Medicaid payback amount is calculated based on the **actual Medicaid rate** for expenditures for the beneficiary during his lifetime (which is significantly lower than private-pay rates for the same services), and does *not* include an "interest" component (which amounts to an **interest-free loan** from the government). The Trustee is well advised to review the details of the alleged payback amount with those persons who were intimately involved in the beneficiary's healthcare plan, as frequent (and significant) errors abound in Medicaid record-keeping.

(7) If the beneficiary during his life has received Medicaid benefits from more than one State, POMS SI 011210.203B.1.h states that the **"trust must provide payback to any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s) . . . ."** Presumably, this requirement dictates a *pro rata* allocation of the property remaining in a first-party Special Needs Trust if the remaining assets are insufficient to satisfy fully the claims of all of the State Medicaid Plans which have provided medical assistance to the beneficiary during his lifetime.

3. In addition to the first-party Special Needs Trust authorized by 42 U.S.C. § 1396p(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(B) authorizes a limited-use first-party Special Needs Trust designed to receive and distribute any income of the beneficiary which is over the "income cap" prescribed by a State for Medicaid long-term care eligibility (*i.e.* nursing home Medicaid). *See* additional discussion in Section IV.A.1.c.(3).(a), *infra*. These trusts are also known as **"Miller Trusts"** or **"Qualified Income Trusts."** The requirements for a valid "(d)(4)(B)" Trust include the following:

a. The trust must be irrevocable and established for the benefit of the beneficiary by himself, his legal Guardian or Conservator, or an attorney-in-fact acting under a Power of Attorney that grants express authority to establish such a trust.

b. The Trustee may be anyone willing to serve as such (including a nursing home), other than the beneficiary.

c. The trust property can consist solely of the beneficiary's income, such as pension benefits, Social Security benefits, investment income and the like. No other assets or resources may be deposited to the trust.

d. All income deposited to the trust must be fully utilized by the end of the following month for permissible purposes only, including payments for (i) the beneficiary's "cost of share" for nursing home expenses (or the covered expenses of the beneficiary under certain other community-based "classes of assistance" of the State Medicaid program); (ii) the beneficiary's "personal needs allowance;" (iii) approved "diversions" to a community spouse or dependent children; or (iv) medical expenses of the beneficiary or a community spouse that are not covered by Medicaid. Notably *excluded* as permissible expenditures are the fees of professional advisors, bank service fees or any non-medical living expenses (*e.g.* mortgage or rent).

e. Upon the death of the beneficiary (or other limited termination events), any funds remaining in the trust must be paid to the State Medicaid program.

C. Third-Party Special Needs Trusts

1. There is **no specific federal statutory authority** for the creation of a third-party Special Needs Trust (*i.e.* one that is funded with assets that do not belong to the beneficiary). However, the POMS published and maintained by the Social Security Administration do specifically address third-party Special Needs Trusts. *See, e.g.*, POMS SI 01120.200.D.2.

2. Third-Party Special Needs Trusts are not subject to most of the federal statutory requirements mandated for first-party Special Needs Trusts, described in Subsection B, *supra*. Thus, most importantly, ***there is no Medicaid payback for a third-party Special Needs Trust*** that is drafted properly from the outset. Consequently, as a general matter, **third-party funds should never be added to a first-party Special Needs Trust, which would unnecessarily subject those funds to the Medicaid payback required for first-party Special Needs Trusts.** Anyone can serve as the Settlor of a third-party Special Needs Trust; the beneficiary need not meet any particular definition of "disability;" there is no age limitation on the beneficiary or the timing of funding the trust; and the beneficiary need not be the sole beneficiary of the trust. The POMS do require that the trust be **irrevocable as to the Beneficiary**, *i.e.* the Beneficiary cannot hold the right to revoke or terminate the trust. *See* POMS SI 01120.200.D.1.b and POMS SI 01120.201.D.1.

3. Third-party Special Needs Trusts may be established ***inter vivos*** (*i.e.* during the Settlor's life), including as part of his estate plan (*e.g.* under a Revocable Living Trust that serves as a Will substitute), or under the Settlor's Will as a **testamentary** trust.

a. However, if the Settlor's spouse is the intended beneficiary of a third-party Special Needs Trust, 42 U.S.C. § 1382b(e) requires that the trust be created under the Settlor's Will (and *not* pursuant to a Will substitute such as a Revocable Living Trust) in order to be disregarded as an "available" or "countable" resource to the spouse for purposes of eligibility for means-tested government benefits (discussed in more detail in Section IV, *infra*).

D. "Pooled" Special Needs Trusts

1. In addition to the single-beneficiary first-party Special Needs Trust authorized by 42 U.S.C. § 1396p(d)(4)(A), described in Subsection B, *supra*, OBRA '93 also authorized the concept of a "pooled" Special Needs Trust, separate accounts in which may be established for the sole benefit of a beneficiary with a disability. 42 U.S.C. § 1396p(d)(4)(C), and related POMS provisions, set forth the following requirements.

a. A pooled Special Needs Trust must be **"established and managed by a non-profit association."** POMS SI 01120.203.B.2.c defines a non-profit association as "an organization established and certified under a State nonprofit statute." As of January 2011, tax-exempt status is no longer required of the non-profit association.

b. A pooled Special Needs Trust must contain the assets of individuals who are **"disabled," as defined** by 42 U.S.C. § 1382c(a)(3) (discussed in Section III.B.2.b, *supra*).

c. The pooled Special Needs Trust must maintain a separate account for the **sole benefit** of each beneficiary with a disability, but may pool the assets of the separate accounts for purposes of investment and management. *See* POMS SI 01120.203.B.2.d and POMS SI 01120.203.B.2.e.

d. A separate account with the pooled Special Needs Trust must be **established by** (i) the beneficiary's legal Guardian of the Property or Conservator; (ii) the beneficiary's parent or grandparent; (iii) a court; or (iv) the beneficiary himself. (In contrast, as noted in Section III.B.2.a., *supra*, under current law, the beneficiary of a (d)(4)(A) Special Needs Trust may not serve as the Settlor to establish a first-party Special Needs Trust for himself.)

e. To the extent that the pooled Special Needs Trust does not retain any amounts remaining in a separate account upon the beneficiary's death, such assets must be used to **reimburse Medicaid** (but not the Social Security Administration) up to the total amount of medical assistance benefits paid on behalf of the beneficiary during his lifetime. *See also* POMS SI 01120.203.B.2.g.

(1) POMS SI 01120.199.F.2 sets forth modified requirements for an acceptable **"early termination"** provision applicable to a beneficiary's account with a pooled Special Needs Trust. The requirements described in Section III.B.2.e.(5), *supra* (*i.e.* for first-party Special Needs Trusts), need not be satisfied in the context of a pooled Special Needs Trust if the early termination provision only allows for the transfer of an account from one pooled Special Needs Trust to another. However, no funds may be retained by the first pooled Special Needs Trust if the termination of the beneficiary's account occurs during his life rather than by virtue of his death.

f. There is **no express statutory limitation on the age** of a beneficiary of an account with a pooled Special Needs Trust, *i.e.* an account may be established with a pooled Special Needs Trust even if the beneficiary is 65 or older (in contrast to a (d)(4)(A) Special Needs Trust, as described in Section III.B.2.d., *supra*). However, many States choose to impose a **penalty for the uncompensated transfer** of the beneficiary's assets to the pooled Special Needs Trust after the age of 65 if the beneficiary wishes to qualify for Medicaid long-term care (*i.e.* nursing home) coverage, or for certain long-term care services rendered in

the community. *See* 42 U.S.C. § 1396p(c)(1)(B)(i)-(ii), (c)(1)(G), (e)(1), (f), and POMS SI 01150.121.A.3.

(1) The United States Court of Appeals for the Third Circuit has recently held that the attempt by the Commonwealth of Pennsylvania to impose an age limitation on the persons who can establish an account with pooled Special Needs Trusts authorized by 42 U.S.C. § 1396p(d)(4)(C) (*i.e.* prohibiting beneficiaries who are 65 years of age or older) violates federal law and is thus preempted. *See Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012).

g. Separate accounts for a pooled Special Needs Trust may be established as **first-party or as third-party**, *i.e.* with reference to the source of the assets with which the account will be funded.

h. Pooled Special Needs Trusts are typically governed by a **"Master Trust Agreement"** that applies to all of the separate accounts. A separate account is established by completing a **"Joinder Agreement,"** which usually does not require the involvement of an attorney (one of the most popular aspects of this option). This is also a very cost-effective option for a beneficiary who has too many assets to maintain his eligibility for means-tested government benefits, but not enough to warrant the expense of creating or maintaining a (d)(4)(A) Special Needs Trust.

i. An account with a pooled Special Needs Trust is often **the only option** for a beneficiary who (i) has no living parents or grandparents, (ii) may be "disabled" but who is mentally competent and thus cannot qualify for a legal Guardian or Conservator, (iii) cannot convince a court to serve as the Settlor of a (d)(4)(A) Special Needs Trust, and/or (iv) is age 65 or older.

E. <u>"Sole Benefit" Trusts</u>

1. 42 U.S.C. § 1396p(c)(2)(B)(iii) and (iv) (Medicaid) and § 1382b(c)(1)(C)(ii)(IV) (Supplemental Security Income) exempt from transfer penalties (for purposes of *the transferor's* eligibility for Medicaid and SSI) any amounts transferred to a trust "solely for the benefit of" (i) the transferor's child (of any age) who is blind or "disabled" (within the meaning of the Social Security Act), or (ii) any person under the age of 65 who is "disabled." *See also* POMS SI 01150.121.A.2 and 3. While a so-called "Sole Benefit Trust" ("SBT") is usually drafted as a Special Needs Trust so that it does not count as an "available" or "countable" resource to a beneficiary who receives means-tested government benefits, the States are split on whether a SBT must contain a Medicaid payback provision (as required of first-party "(d)(4)(A)" and "(d)(4)(C)" Special Needs Trusts), or whether the trust agreement can instead mandate that all trust property must be paid out on an "actuarially sound" basis over the beneficiary's estimated life expectancy (which might be a viable option for beneficiaries who do not receive means-tested government benefits). The States are further split on the definition of "sole benefit" distributions, both in the context of SBTs and the other types of Special Needs Trusts discussed in this Section III, *supra*. These are discussion topics for another program.

F. Compliant Special Needs Trusts are not "available" or "countable" for purposes of "means-tested" government benefits

1. Special Needs Trusts that are ***properly drafted*** **are not considered "available"** or "countable" for purposes of the beneficiary's eligibility for "means-tested" government benefits, such as Medicaid and Supplemental Security Income (discussed in Section IV, *infra*).

a. A properly drafted Special Needs Trust (whether for a first-party or a third-party trust) will specify that the Trustee is not obligated, and cannot be compelled by the beneficiary, to use the assets of the trust to provide for the beneficiary's "support" or "maintenance." **The use of the "support" or "maintenance" distribution standards typically results in the trust assets being deemed "available" or "countable" to the beneficiary for purposes of means-tested benefits.** *See* POMS SI 01120.200.D.2.

(1) Thus, the **classic "ascertainable standards"** for trust distributions found in most testamentary "Bypass/Credit Shelter Trusts" (*i.e.* "health, education, ***maintenance*** **and** ***support***") will generally render the assets of those trusts **"available" or "countable"** resources to a beneficiary seeking to maintain his eligibility for means-tested government benefits.

(2) While some practitioners utilize a **fully discretionary distribution** standard for Special Needs Trusts, unadorned by any descriptive standard whatsoever, many professional Trustees prefer an **illustrative listing of permissible types** of distributions that can be made from a Special Needs Trust without adversely impacting the beneficiary's means-tested benefits. The following are a few of the most common types of permissible disbursements.

(a) Payments directly to the **providers of services** for the sole benefit of the beneficiary, including medical equipment, supplies, or services not covered by Medicaid; household services, including cable TV, internet, telephone, security alarm, housekeepers; professional services, including those of attorneys, accountants, care managers, life care planners, benefits advocates, special education advocates, investment advisors; personal care services, such as dry cleaning, laundry, hairstylists, massage therapists, acupuncturists, personal attendants; counseling and therapies.

(b) Payments directly to the **providers of goods** for the sole benefit of the beneficiary (excluding food and shelter), including household appliances, furniture and furnishings; clothing and personal effects; camera and computer equipment; musical instruments; fitness and sporting equipment; hobby supplies; magazine and newspaper subscriptions; holiday decorations and cards; linens and towels; stationery and stamps; tickets to recreational or entertainment events.

(c) **"Quality of life"** expenditures, such as appropriate vacations; educational opportunities and supplies; club memberships; a pet or service animal and its required supplies and veterinary care.

(d) **Transportation** costs, including an appropriate private vehicle (and the fuel, maintenance and insurance therefor); taxi or private driver; public transportation passes; bicycle, moped or golf cart.

(e) **Non-food** grocery and household items; personal care and hygiene items; over-the-counter medications.

(f) Direct payment of the beneficiary's **credit card bill** for items other than shelter or food (*e.g.* no payment for groceries, restaurant dinners, catered meals).

b. A properly drafted Special Needs Trust (whether for a first-party or third-party trust) will **not allow the beneficiary to revoke** or terminate the trust. *See, e.g.*, POMS SI 01120.200.D.1.b.

(1) Even if a Special Needs Trust contains an express irrevocability provision, beware the impact of esoteric common law doctrines such as the "Rule in Shelley's Case," the "Doctrine of Worthier Title," the "Doctrine of Merger," or the "Settlor-Sole Beneficiary Rule," the application of which can cause the trust to be deemed *revocable* under State law. *See, e.g.*, POMS SI ATL 01120.201. *See also* Mary F. Radford & Clarissa Bryan, *Irrevocability of Special Needs Trusts: The Tangled Web That is Woven When English Feudal Law is Imported Into Modern Determinations of Medicaid Eligibility*, NAELA Journal, Vol. VIII, No. 1 (Spring 2012).

c. A properly drafted Special Needs Trust (whether for a first-party or a third-party trust) will specify the Settlor's intention that **the trust should "supplement, not supplant" any public or private benefits** for which the beneficiary may be eligible as a consequence of his disability.

(1) Nevertheless, the Trustee should also be given the latitude to **"opt out" of such benefits** if they are not reasonably available to the beneficiary (*e.g.* the expense of obtaining the benefits exceeds the value thereof), or if the benefits are insufficient or otherwise inadequate to provide fully for the beneficiary's needs.

2. Special Needs Trusts that are ***properly administered*** **are not considered "available"** or "countable" for purposes of the beneficiary's eligibility for "means-tested" government benefits, such as Medicaid and Supplemental Security Income (discussed in Section IV, *infra*).

a. In general, the Trustee of a Special Needs Trust must make disbursements **directly to the provider** of goods and services for the sole benefit of the beneficiary with the disability, for purposes ***other than the beneficiary's food or shelter needs*** (*i.e.*, the two categories of disbursements that the government includes in a person's "support" and "maintenance").

(1) Nevertheless, a Special Needs Trust **should not specifically prohibit** the Trustee from using the assets of the trust for the beneficiary's **food or shelter** needs, notwithstanding a possible reduction in the beneficiary's means-tested government benefits for such use, if to do so would serve the best interests of the beneficiary.

(a) The classic example of a situation where it would be in the beneficiary's best interests to use the assets of a Special Needs Trust to provide for his shelter is where his monthly cash benefit from Supplemental Security Income (maximum federal benefit for 2016 is $733/month) is insufficient to cover his rent or mortgage payment. If the Trustee of

the Special Needs Trust either (i) "makes up the difference" between the SSI payment and the rent or mortgage payment that is due, or (ii) pays the entire rent or mortgage payment that is due, this will in turn reduce the beneficiary's SSI payment for that month. *See* POMS SI 01120.200.F. As long as the Trustee is cognizant of the impact on the beneficiary's benefits of such disbursements, any potentially adverse impact on the beneficiary's overall living situation can generally be managed in the best interest of the beneficiary.

(2) Cash (or an unrestricted debit card, or items that can be converted to cash, *e.g.* a gift card) should never be distributed directly to the beneficiary, as this will result in a dollar-for-dollar reduction in the beneficiary's means-tested benefits.

3. As noted in Section III.B.2.c.(2), *supra*, transfers by a beneficiary under age 65 of his assets to a first-party Special Needs Trust that is *properly drafted and properly administered* are **not penalized as "uncompensated transfers"** for purposes of the beneficiary's eligibility for means-tested benefits. *See* 42 U.S.C. §§ 1396p(c)(2)(B) (iii) and (iv); 42 U.S.C. § 1382b(c)(1)(C)(ii)(IV); POMS SI 01150.121.A.3.

a. However, as noted in Section III.D.1.f, *supra*, numerous States do choose to penalize the funding of a (d)(4)(C) pooled Special Needs Trust account by a beneficiary who is **65 years of age or older** at the time of the funding transfer.

b. In general, transfer penalties for purposes of **Supplemental Security Income** apply to uncompensated transfers during a **36-month "look-back period,"** which starts from the date of the transfer or the date of the application for SSI, whichever is later. 42 U.S.C. § 1382b(c)(1)(A)(iv). To calculate the period of ineligibility, the amount transferred is divided by the transferor's monthly SSI benefit, rounding up or down to the nearest whole number. Uncompensated transfers to trusts that are not safe harbor "(d)(4)(A)" or "(d)(4)(C)" Special Needs Trusts (or a "Sole Benefit Trust," as described, *supra*, in Section III.E.) are generally treated as available resources if there are *any* circumstances under which the Trustee could make distributions for the benefit of the transferor or his spouse. POMS SI 01120.201.D.2.a and b.

c. In general, transfer penalties for **Medicaid** purposes include a maximum **"look-back period" of 60 months**. The penalty period is determined by dividing the value of the transferred assets by the statewide average private-pay rate for nursing home services. *See* 42 U.S.C. § 1396p(c)(1)(E) and POMS SI 01730.046.

4. Recent development. On June 12, 2012, the United States Court of Appeals for the Third Circuit held that the Medicaid program administered in the Commonwealth of Pennsylvania could not impose additional criteria for the exemption of pooled Special Needs Trusts authorized by 42 U.S.C. § 1396p(d)(4)(C). *See Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012). Pursuant to the federal preemption doctrine, the Court struck down the following elements of a Pennsylvania statute that purported to impose additional qualification criteria over and above those set forth in the federal statute: (i) a restriction on the amount of funds in a deceased beneficiary's account that can be retained by the pooled Special Needs Trust; (ii) a requirement that expenditures from a beneficiary's account must be "reasonably related" to the beneficiary's needs; (iii) a requirement that the beneficiary's special needs could not be met without the funds in the beneficiary's account; (iv) a definition of "special needs" that limits permissible disbursements to "items, products or

services . . . related to the treatment of the beneficiary's disability;" and (iv) a restriction limiting beneficiaries of a pooled Special Needs Trust to those under 65 years of age.

a. The Court held that "Congress intended that special needs trusts be defined by a specific set of criteria that it set forth and no others. We base this upon Congress' choice to provide a list of requirements to be met by special needs trusts. The venerable canon of statutory construction— *expressio unius est exclusio alterius*—essentially says that where a specific list is set forth, it is presumed that items not on the list have been excluded. . . . Absent an explicit statement or a clear impression that States are free to expand the list, *expressio unius* leads us to conclude they are not." *Id.* at 347.

b. Earlier in its decision, the Court concluded that "in determining Medicaid eligibility, States are **required to exempt any trust meeting the provisions** of 42 U.S.C. § 1396p(d)(4)." *Id.* at 344. The Third Circuit's holding that "42 U.S.C. § 1396p(d)(4) imposes mandatory obligations upon the States" is contrary to the position of the Second Circuit in *Wong v. Doar*, 571 F.3d 247 (2d Cir. 2009), and the Tenth Circuit in *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000), which held that 42 U.S.C. § 1396p(d)(4) **does not mandate that the States exempt special needs trusts meeting its criteria**. *Id.* at 343. On January 14, 2013, the United States Supreme Court denied a Petition for Writ of Certiorari, thus leaving intact the Third Circuit's decision. *See* 133 S.Ct. 933 (2013). This issue is thus **ripe for a review by the United States Supreme Court**.

IV. GOVERNMENT BENEFITS THAT ARE "MEANS-TESTED" AND THOSE THAT ARE BASED ON A WORKER'S EMPLOYMENT HISTORY

A. "Means-tested" government benefits for persons with disabilities

1. The two most relevant means-tested government benefits programs that persons with disabilities wish to maintain are **Supplemental Security Income ("SSI")**, a monthly cash benefit intended to cover a person's food and shelter needs (maximum Federal Benefit Rate for 2016 of $733/month, although some States provide "State supplements" to this base amount) and **Medicaid**, which provides basic health care and medical services. Financial eligibility for means-tested government benefits is determined by reference to the applicant's "available" or "countable" income and resources. **Properly drafted, established, funded and administered Special Needs Trusts do not count against the beneficiary in determining financial eligibility for these means-tested benefits.**

a. SSI is authorized by Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f, and Title 20, Part 416 of the Code of Federal Regulations. The **SSI eligibility requirements** include:

(1) The applicant is aged **65 or older, blind or "disabled"** (*i.e.* unable to engage in "substantial gainful activity," as described in Section III.B.2.b., *supra*). If the applicant is under the age of 18, disability is defined by reference to "marked and severe functional limitations," as described in Section III.B.2.b., *supra*.

(2) The applicant has **minimal earned and unearned income and resources** to pay for his food and shelter needs.

(a) Resources include the applicant's cash or other assets that he owns and can convert to cash and use for his support and maintenance. Resources are either "exempt" (*e.g.* a home, one automobile, normal household items and personal effects, certain burial funds and items) or "countable." Countable resources **cannot exceed $2,000** for an individual, or $3,000 for a couple.

(1) Special Needs Trusts that are properly drafted, established, funded and administered are **considered "unavailable"** or "not countable" to the beneficiary for purposes of his financial eligibility for SSI.

(b) An applicant's **income may be either "earned" or "unearned,"** and if it is "countable" will reduce the amount of his monthly SSI cash payment. There are limited income exclusions which include the first $20 of income in a month (other than "In-Kind Support and Maintenance" ("ISM"), discussed *infra*); $65 of earned income in a month, plus half of the remaining earned income in a month, and for a person who is disabled but not blind, the first $780 per year. "Earned income" only **reduces the SSI payment** by 50 cents for each dollar earned, while "unearned income" reduces the SSI payment dollar-for-dollar (with special rules for ISM, discussed *infra*).

(1) "Earned" income includes wages; net earnings from self-employment; payments for participating in a sheltered workshop or other supported employment; royalties; and honorariums.

(2) "Unearned" income is all income that is not earned, and includes ISM; private pensions and annuities; periodic payments, such as Social Security Disability Income payments, worker's compensation, veterans benefits, unemployment benefits; life insurance proceeds or other death benefits; gifts and inheritances; support and alimony; dividends and interest; and rents and royalties.

(A) There is one recent notable exception to the general rule that veterans benefits are non-assignable and thus constitute unearned income to the recipient: the **military "Survivor Benefits Plan" ("SBP")** retirement annuity option for the benefit of a "disabled dependent child." (For purposes of this program, a "dependent child" is defined in 10 U.S.C. § 1447(11), and "disabled" is defined in 42 U.S.C. § 1382c(a)(3).) The "Disabled Military Child Act" (Public Law 113-291, amending Title 10, U.S.C. §§ 1448, 1450 and 1455), signed by President Obama on December 19, 2014, now authorizes military parents to elect that the SBP annuity for a disabled dependent child shall be **payable to a *first-party* Special Needs Trust**. *(See* discussion, *supra*, at Section III.B., for the requirements of a first-party Special Needs Trust.) The Department of Defense issued implementation guidance on December 31, 2015 in the form of a "Memorandum" to the Deputy Assistant Secretaries of the Army, Navy and Air Force, captioned "Enabling Payment of Survivor Benefit Plan Annuities to a Special Needs Trust" (available at http://www.moaa.org/uploadedFiles/Content/Take_Action/Top_Issues/Spouse_and_Family/SNTPolicyFinal31Dec15.pdf).

(3) "In-Kind Support and Maintenance" ("ISM") consists of food or shelter provided directly to the applicant and paid for by a third person, including a Special Needs Trust. This category of unearned income does not result in a dollar-for-dollar reduction of the SSI benefit, but is generally limited to a **maximum reduction** equal to one-third of the maximum SSI Federal Benefit Rate (plus $20, in come cases),

regardless of the actual value of the food and shelter provided. **"Shelter" includes only the following** items: mortgage payments (including any property insurance required by the mortgage holder); real property taxes; rent; heating fuel; gas; electricity; water; sewer; and garbage removal. *See* POMS SI 00835.465.D.1. The dollar value of these items is added and divided by the number of people living in the home to determine each person's "fair share." If a person is not paying at least this amount towards his fair share (*e.g.* with his monthly SSI benefit), his SSI benefit will be reduced by the lesser of the actual value of his share of these items, or a full one-third of the SSI Federal Benefit Amount (even if the deficit between his fair share and the amount he can contribute is less than the one-third figure). *See* POMS SI 01120.200.E.1.b. and POMS SI 01120.200.F.3.c.

(A) In contrast, distributions for the shelter-related expenses of the beneficiary from an account established under the "ABLE Act" (*i.e.* the "Stephen Beck, Jr. Achieving a Better Life Experience Act of 2014" (Public Law 113-295)) do not constitute ISM if utilized in the month of receipt. *See* POMS SI 01130.740.C.4. However, if a distribution for those purposes is not spent in the month of receipt, *i.e.* it is retained into the month following the month of receipt, it will be counted as a "resource" subject to the normal SSI counting rules. *See* POMS SI 01130.740.D.2. ABLE Accounts are also governed by Section 529A of the Internal Revenue Code, and proposed Treasury Regulations §§ 1.529A-01 *et seq.*

(c) In certain circumstances, the income or resources of other persons may be **"deemed" available** to the applicant for purposes of financial eligibility for SSI, including from a parent who is not eligible for SSI to an unmarried minor child who is applying for SSI, and from a spouse who is not eligible for SSI to a spouse who is applying for SSI. *See* POMS SI 01310.001.

(3) The applicant is a **U.S. citizen, U.S. national or a "qualified alien,"** as defined in 8 U.S.C. § 1641(b).

b. Medicaid is governed by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396w-5. **Medicaid eligibility requirements** and benefits can vary from State to State, as it is a program that is jointly administered and funded by the Federal government and the States. Medicaid eligibility is often inextricably linked to SSI eligibility. In this regard, there are three main classifications of State Medicaid programs.

(1) "§ 1634 States," in which SSI recipients automatically qualify for, and are enrolled in, the State Medicaid program. Thirty-three States and the District of Columbia fall into this category. *See* POMS SI 01715.010.A.3.

(2) "SSI criteria States," in which the eligibility criteria are the same for SSI and Medicaid, but which require a separate application process for each benefit. Seven States (and the Northern Mariana Islands) fall into this category (Alaska, Idaho, Kansas, Nebraska, Nevada, Oregon and Utah). *See* POMS SI 01715.010.A.2.

(3) "§ 209(b) States," in which at least one of the Medicaid eligibility criteria is more restrictive than the SSI eligibility criteria, and which require a separate application process for each benefit. Ten states fall into this category (Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma and Virginia). *See* POMS SI 01715.010.A.1. In determining a person's eligibility for Medicaid, the States in

this category may not use a methodology that is more restrictive than that used by the SSI program on January 1, 1972. *See* 42 U.S.C. §§ 1396a(a)(10)(C)(i)(III) and 1396a(r)(2).

c. There are three main types of Medicaid eligibility:

(1) "Categorically needy" persons qualify for Medicaid if they also qualify for certain other government benefits programs, typically SSI. All States are required to cover the categorically needy. *Ramey v. Reinertson*, 268 F.3d 955, 960 (10th Cir. 2001), citing *Herweg v. Ray*, 455 U.S. 265, 268 (1982).

(a) In working with families who have adult children with disabilities, practitioners will find that many of these persons obtain their Medicaid coverage by virtue of their **eligibility for at least $1 of SSI**. Thus, it is critical that Special Needs Trusts for such individuals be administered in such a way that disbursements do not totally eliminate the beneficiary's monthly SSI payment. This might happen, for example, if the Special Needs Trust pays for the beneficiary's shelter costs, which constitutes ISM, which can reduce the beneficiary's SSI payment by up to one-third of the maximum Federal Benefit Rate at the time of reference. If the beneficiary's monthly SSI benefit amount is less than this one-third amount before the reduction for ISM, and is reduced to zero after the reduction, his SSI-linked Medicaid coverage is lost.

(2) "Optionally categorically needy" persons with limited resources can qualify for Medicaid if their monthly incomes are not more than 300% of the Federal Benefit Rate (*i.e.* $2,199 in 2016).

(3) "Medically needy" persons with limited resources can qualify for Medicaid even if their incomes are over 300% of the Federal Benefit Rate, if their monthly medical expenses exceed their income and they agree to "spend-down" their excess income on their medical expenses.

(a) In 2016, **"Spend Down" States** include California, Connecticut, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

(b) Some States, known as **"Income Cap" States**, do not allow the "medically needy" to qualify for Medicaid by means of a "spend-down" of excess income. However, any excess income may be transferred to a Qualified Income Trust authorized by 42 U.S.C. § 1396p(d)(4)(B), discussed in Section III.B.3, *supra*. In 2016, the Income Cap States include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas and Wyoming.[6]

(4) "Dual eligibles" are persons who qualify for both Medicaid and Medicare. By virtue of their Medicare eligibility, these persons qualify for State Medicaid programs that will help them pay their Medicare premiums, co-payments or deductibles (*e.g.*

[6] http://payingforseniorcare.com/longtermcare/resources/medicaid.html.

the "Qualified Medicare Beneficiaries" program and the "Specified Low-Income Beneficiaries" program), and their prescription drug premiums or costs (*e.g.* the "Low-Income Subsidy" program run by the federal government). *See* additional discussion at Subsection B.1.e, *infra*.

d. Theoretical eligibility for SSI and Medicaid is also required for numerous private and community-based programs, *e.g.* group home residential arrangements and "life skills" programs. Access to these programs is limited to those persons whose financial affairs have been arranged so that they are theoretically eligible for SSI and Medicaid (regardless of whether Medicaid is actually providing medical assistance), and some will only accept SSI benefits as payment for program services. **A family's private wealth cannot guarantee access to these beneficial programs, contrary to the belief of the many wealthy clients** are who accustomed to doing business on a "money talks" basis. Thus, even families of great wealth are engaging in Special Needs Trust planning for their beneficiaries with disabilities so as to gain access to these programs.

B. Employment-based government benefits for persons with disabilities

1. Many persons with disabilities are eligible for employment-based government benefits **determined by reference to the employment history of a worker** or that of his or her spouse or parent. The applicant's income and resources generally do not adversely impact these benefits, *i.e.* ***these benefits are not means-tested.*** Under Title II of the Social Security Act, the "Old Age, Survivors and Disability Insurance" program ("OASDI"), the Social Security Administration affords certain benefits for workers, and their families, when the worker retires, becomes disabled or dies. *See* 42 U.S.C. §§ 401-434; 20 C.F.R. §§ 404.1-404.2127.

a. Social Security Retirement benefits provide monthly cash payments to eligible workers who have attained at least 62 years of age, and who have worked, and paid FICA taxes on sufficient earnings, and have earned at least 40 "credits" (a maximum of four credits each year). *See* 42 U.S.C. § 414(a)(2). In 2016, the amount of earnings needed to earn one credit is $1,260 (or $5,040 to earn the maximum of four credits for the year). Credits are based on total wages (or self-employment income) during the entire year, no matter when during the year the actual work was performed. *See* U.S. Social Security Administration, Cost-of-Living Adjustment (COLA).[7]

b. Social Security Disability Insurance ("SSDI") benefits are monthly cash payments to a worker whose mental or physical disability renders him incapable of "Substantial Gainful Activity," as defined, *supra,* in Section III.B.2.b. The required number of credits to secure this benefit varies depending on the age at which the worker became disabled. *See* https://www.ssa.gov/planners/credits.html. The SSA uses a "sequential evaluation process" to determine if the claimant's disability is sufficiently medically severe, and whether he can engage in any type of work available in the national economy taking into account his age, education, work experience and functional capacity.

c. The **SSDI** program also pays monthly benefits to a person over the age of 18 (i) whose disability began prior to the age of 22, (ii) who is consistently unable to engage in "Substantial Gainful Activity," and (iii) who is unmarried, or married to another similarly

[7] http://www.socialsecurity.gov/news/press/factsheets/colafacts2015.pdf.

situated person. *See* 20 C.F.R. § 404.350(a)(5) and POMS DI 10115.001. This category of benefits is currently called **"Childhood Disability Benefits" ("CDB")**, but it was formerly known as **"Disabled Adult Child"** benefits. This benefit is payable to the adult child of his parent based on *the parent's* work and earnings record.

(1) In order to be eligible for the CDB benefit, the adult child's parent (i) must be receiving Social Security retirement or disability benefits, or (ii) must have died with sufficient earned credits. Payments under the CDB program count as "unearned income" to the adult child for purposes of the SSI program, thus reducing the SSI benefit dollar-for-dollar (after a $20 income exclusion), and often eliminating the SSI benefit entirely. If the adult child is determined to be eligible for the CDB, it cannot be declined in favor of SSI eligibility.

d. There are various ways for a person to become eligible for **Medicare**, a federal insurance program with no income or resource limitations. *See* Title XVIII of the Social Security Act, 42 U.S.C. §§ 1395-1395kkk-1. Workers who have attained age 65, and are eligible for Social Security retirement benefits, are also eligible for Medicare. In addition, once a person has received **SSDI benefits (including CDB benefits) for 24 months**, he can become eligible for Medicare coverage, which includes the following elements.

(1) "Part A" providing hospital insurance.

(2) "Part B" providing medical insurance.

(3) "Part C" is an alternative option to traditional Part A and Part B coverage, and provides access to various managed care programs.

(4) "Part D" providing prescription drug coverage.

e. Once a person becomes eligible for Medicare, there are additional programs available to persons with low income, that may be administered through the State Medicaid program (known as **"Medicare Savings Programs"**). Such programs include (i) the "Qualified Medicare Beneficiary" ("QMB") program, which pays the premiums for Part A and Part B Medicare coverage, as well as Medicare co-insurance payments and deductibles; (ii) the "Specified Low Income Medicare Beneficiary" ("SLMB") program, which pays for the Part B premium; and (iii) the "Low Income Subsidy" (or "Extra Help") program, which helps pay for prescription drug coverage under Medicare Part D. As noted in Subsection A.1.c.(4), *supra*, these programs **are means-tested**, and may require the payment of premiums determined with reference to the person's countable income.

V. SPECIAL NEEDS TRUST TAX CONSIDERATIONS

A. First-Party Special Needs Trusts

1. A first-party Special Needs Trust typically qualifies as a "grantor trust" for federal income tax purposes. Regardless of who serves as the Settlor, the sole beneficiary is almost always treated as the "grantor" for income tax purposes. Thus, the income and gains generated by the assets of a first-party Special Needs Trust that is a grantor trust are taxed to the beneficiary of the trust under IRC § 671, whether or not actually

distributed to, or for the benefit of, the beneficiary. (A full discussion of the rules that govern trust taxation is beyond the scope of this outline.)

a. IRC § 677 supports grantor trust status for a first-party Special Needs Trust with a "non-adverse party" serving as Trustee (*i.e.* because trust income is, or may be, payable to the beneficiary in the discretion of a non-adverse party, or held or accumulated for future distribution to the beneficiary). Ltr. Rul. 200620025 held that a first-party (d)(4)(A) Special Needs Trust was a grantor trust with respect to the beneficiary under IRC § 677(a)(1) and (2), since the income of the trust was to be used, or accumulated, for the benefit of the grantor-beneficiary in the discretion of a Trustee who was not an adverse party. IRC § 672(a) defines "adverse party" as any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-exercise of the power he possesses. IRC § 672(b) defines "non-adverse party" as any person who is not an adverse party. Thus, a Trustee who has no beneficial interest in a first-party Special Needs Trust, *e.g.* as a remainder beneficiary, would be a non-adverse party. *See also* Rev. Rul. 83-25, 1983-1 C.B. 116.

b. Other mechanisms for assuring grantor trust status for a first-party Special Needs Trust include vesting the beneficiary with a non-testamentary special power of appointment over the trust corpus remaining at death after the Medicaid payback is satisfied. *See* IRC § 674.

(1) Even if the beneficiary is not capable of exercising the power of appointment due to his disabling condition, the mere possession of the power has been held sufficient. *See, e.g.*, Rev. Rul. 55-518, 1955-2 C.B. 384.

c. Granting the sole beneficiary of a first-party Special Needs Trust the administrative "power to reacquire the trust corpus by substituting other property of an equivalent value" under IRC § 675(4)(C) will also assure grantor trust status.

(1) In some regions, the Social Security Administration has attempted to characterize a power to substitute property as tantamount to an impermissible right of the beneficiary to revoke the first-party Special Needs Trust. A power of revocation held by the beneficiary of a first-party Special Needs Trust is grounds for disqualification under POMS SI 01120.201.D.1.

d. If a first-party Special Needs Trust is a grantor trust for income tax purposes, it cannot qualify as a "Qualified Disability Trust' under IRC § 642(b)(2)(C)(ii), discussed *infra,* in Section V.B.2.

2. It is generally beneficial for a first-party Special Needs Trust to be taxed as a grantor trust with respect to the beneficiary for income tax purposes, inasmuch as most trust beneficiaries are in a lower income tax bracket than the compressed tax brackets that would otherwise apply to an irrevocable non-grantor trust. In 2016, a single individual taxpayer reaches the 39.6% bracket at $466,950 of taxable income, while an irrevocable non-grantor trust reaches the 39.6% bracket at only $12,400 of income. *See* Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

a. Since the typical beneficiary of a first-party Special Needs Trust will have no access to assets to enable him to satisfy his personal income tax liability with respect to the income and gains generated by the trust, it is advisable to include in the trust agreement a

provision that allows the Trustee to utilize the assets of the trust to satisfy that income tax liability.

b. "Income" for income tax and trust accounting purposes can be a vastly different concept from "income" for purposes of means-tested benefits. *See* Section IV.A.1.a.(2).(b), *supra*, for a discussion of the latter. For example, if the Trustee of a Special Needs Trust uses trust principal to pay the beneficiary's rent, this constitutes "income" to the beneficiary for purposes of his means-tested government benefits, but it does not constitute income for income tax purposes. If the Trustee uses trust principal to pay for the beneficiary's education, the disbursement would not constitute income for purposes of either the income tax or means-tested benefit programs.

(1) This **definitional distinction** can cause tremendous issues for the beneficiary of a first-party Special Needs Trust, especially as the computer systems of the IRS and State revenue divisions communicate electronically with the computer systems of the Social Security Administration and the State Medicaid programs. Thus, after the beneficiary of a first-party Special Needs Trust (which is a grantor trust for income tax purposes) files his individual income tax returns properly reporting the income and gains attributable to the property with which his trust is funded, the State Department of Revenue computer is likely to send an "Alert" to the State Medicaid computer that the Medicaid-eligible beneficiary has reported $xxx of taxable "income" (which, of course, always exceeds the amount of "income" that a Medicaid recipient can have and still retain eligibility). A benefits termination letter to the beneficiary, issued by an "auto-attendant," often ensues without any opportunity to speak with a live person about the critical distinctions between these definitions of "income." Occasionally, even a discussion with a live person is insufficient to convince the State Medicaid program that **the beneficiary remains eligible notwithstanding the proper income tax reporting of the income and gains** generated by the assets of the first-party Special Needs Trust. This is when one or more of the numerous "allied professionals" on the beneficiary's Special Needs Team must leap into action to prevent the erroneous termination of his means-tested benefits. *See, infra*, in Section VI.E.

c. If a first-party Special Needs Trust is a grantor trust with respect to the beneficiary, and the Trustee uses trust assets to pay for the beneficiary's medical expenses, the taxable income reportable by the beneficiary on his personal tax return may be offset by those **trust-funded medical expenses** (if they exceed 10% of the beneficiary's Adjusted Gross Income starting in 2013). IRC § 213(d)(1)(A) (and the regulations thereunder) defines deductible "medical expenses" to include the costs of "diagnosis, cure, mitigation, treatment or prevention of disease," and the costs of treatments "affecting any structure or function of the body." This definition would encompass the following.

(1) Premiums for health and medical insurance, amounts paid for qualified long-term care services, and limited amounts paid for a qualified long-term care insurance contract.

(2) Prescribed medicine and drugs.

(3) The costs of transportation to obtain medical care, and the travel costs of a companion for a person who cannot travel alone.

(4) The cost of rendering a vehicle wheelchair accessible.

(5) Medically necessary caregiver services, even if not rendered by a licensed medical professional, as long as the services are of a type generally performed by a nurse.

(6) Certain long-term care services for the "chronically ill," as defined in IRC § 7702B(c)(2). Payments to family members for long-term care services are not deductible unless the person is a "licensed professional with respect to such service."

(7) Meals and lodging for a caregiver rendering nursing or long-term care services.

(8) The cost of care in an assisted living facility, nursing home or other institution (including meals and lodging), if the principal reason for the placement is to obtain medical care.

(9) The entire cost of a skilled nursing home facility.

(10) The costs of living in a transitional group residence pursuant to the recommendation of a psychiatrist.

(11) The costs of a special education school that trains a child to overcome learning disabilities, including tuition, meals and lodging, if recommended by a doctor and if the principal reason for attending the school is to overcome the child's learning disabilities.

(12) Doctor recommended tutoring by a teacher who is specially trained and qualified to work with children who have learning disabilities caused by mental or physical impairments.

(13) Admission and travel to medical conferences that address the illness or condition of the patient.

(14) The costs of maintaining medically necessary special equipment.

(15) The cost of special equipment installed in a home, or improvements made for medical purposes (deductible only to the extent that the reasonable cost exceeds the increased value of the property, if any, that results from the improvement), including entrance and exit ramps; widening doorways; installing railings or support bars; installing lifts; modifying stairways; grading the property to provide ready wheelchair access to the residence.

(16) For more examples of deductible medical expenses, consult IRS Publication 502, "Medical and Dental Expenses" (available at www.IRS.gov/pub/irs-pdf/p502.pdf).

In contrast, if the Trustee of a non-grantor Special Needs Trust (*i.e.* most *inter vivos* third-party Special Needs Trusts) makes such disbursements for the beneficiary's medical expenses, the trust may not deduct them as medical expenses. However, the trust may be entitled to a distribution deduction under IRC §§ 651 and 661 (and a corresponding amount will constitute income to the beneficiary reportable on his individual income tax return).

3. If a first-party Special Needs Trust is a grantor trust for income tax purposes, it is permissible to **use the grantor-beneficiary's Social Security Number**, rather than a separate trust Federal Employer Identification Number ("FEIN"), to report the trust's income and gains on the beneficiary's individual Form 1040. However, professional Trustees generally do **obtain a separate FEIN** for a first-party Special Needs Trust to help reinforce the notion that the trust and the beneficiary are not the same for purposes of the beneficiary's ongoing eligibility for means-tested government benefits. This optional approach is permitted by Treas. Reg. § 301.6109-1(a)(2)(i)(B). Even if the trust does have a separate FEIN, it would not be proper for the Trustee to file a full Form 1041 for the trust. Instead, the Trustee should file a simple informational return on Form 1041 notifying the IRS that the trust's income and gains will be reported on the grantor-beneficiary's personal individual return. The beneficiary should simply receive a copy of this filing; a Schedule K-1 should *not* be used for this purpose.

4. Since the Trustee of a first-party Special Needs Trust retains discretion to use the *entire* corpus and income contributed to the trust by the beneficiary, for the *sole benefit* of the beneficiary, there should be **no gift tax consequences** to the beneficiary upon funding. However, the gift tax consequences of a transfer of the beneficiary's assets to a first-party Special Needs Trust were tangentially addressed in Ltr. Rul. 9437034. The beneficiary of a first-party Special Needs Trust funded with a personal injury settlement retained a testamentary special power of appointment over any property remaining in the trust after the Medicaid payback. This power was duly exercised in the beneficiary's Last Will and Testament prior to his death. The requested ruling concerned the includability of the trust corpus in the beneficiary's gross estate for federal estate tax purposes. In holding that the trust corpus remaining at the beneficiary's death was includable in his gross estate under IRC §§ 2038 and 2036(a), the Service also noted in passing that the beneficiary's retained right to alter the disposition of the trust corpus at his death through the exercise of the special testamentary power of appointment rendered the funding transfer an incomplete gift under Treas. Reg. § 25.2511-2(b). *Query* whether it would be possible to value any alleged gift of a remainder interest in a first-party Special Needs Trust, considering (i) the unpredictable impact of a disability on the beneficiary's life expectancy, (ii) the Trustee's complete discretion to disburse the entire trust corpus, and income, for the beneficiary's special needs, and (iii) the Medicaid payback obligation.

5. The estate tax consequences to the beneficiary of a first-party Special Needs Trust are generally well-settled. IRC § 2036(a)(1) will operate to cause **inclusion in the beneficiary's gross estate** of any property remaining in the trust at the time of his death. *See also* Ltr. Rul. 9437034, *supra*.

a. The value of the trust property that is properly includable in the beneficiary's gross estate could be significantly reduced by virtue of the **"payback" claim** against the trust held by any Medicaid program(s) which provided medical assistance to the beneficiary during his lifetime. *See* IRC § 2053(a)(3). Furthermore, there may be a **"stepped-up basis"** available for any assets remaining in a first-party Special Needs Trust at the death of the beneficiary under IRC § 1014(b)(9), thus minimizing any capital gains tax payable upon the liquidation of the assets to satisfy the Medicaid payback.

(1) POMS SI 01120.203.B.3.a permits the payment from the assets of a first-party Special Needs Trust remaining at the death of the beneficiary any state and federal estate or inheritance taxes attributable to the inclusion of the trust assets in his gross estate,

prior to satisfying the Medicaid payback interest. (Thus, the Trustee can choose which government entity to please: the IRS or Medicaid, neither of which pleases the remainder beneficiaries of the trust!)

b. To the extent that a first-party Special Needs Trust has been funded by means of guaranteed annuity payments (often referred to as a **"structured settlement"**), the present value thereof is also fully includable in the beneficiary's gross estate under **IRC § 2039**. Annuity contracts do not typically provide for the acceleration of future guaranteed payments to pay the annuitant's estate tax liability unless a "commutation right" has been purchased when the annuity is procured (for a hefty charge of 5% or more of the total premium paid for the annuity).

B. Third-Party Special Needs Trusts

1. An *inter vivos* third-party Special Needs Trust is most typically drafted as a **non-grantor "complex trust"** that is not required to distribute all of its income. Thus, such a trust would file its own income tax returns under **its own FEIN**, and be subject to the compressed tax brackets applicable to irrevocable non-grantor trusts. Nevertheless, if the trust's **Distributable Net Income ("DNI")** (as defined under IRC § 643(a)) is "carried out" to the beneficiary in a given tax year, it is taxable to the beneficiary. The trust then issues the beneficiary a Schedule K-1 showing the taxable income properly reportable on his personal income tax return. (A full discussion of the rules that govern trust taxation is beyond the scope of this outline.)

a. It is certainly possible, however, to draft an *inter vivos* third-party Special Needs Trust so that it is a "grantor trust" with respect to (typically) the person who establishes and funds the trust (*e.g.* the beneficiary's parent during that person's lifetime) by invoking one or more of the grantor trust rules set forth in IRC §§ 671-679. In this fashion, the parent would be responsible for paying the income taxes on the trust's income and gains, leaving the trust property undiminished by the amount of the tax payments and reducing the parent's potential taxable estate by a similar amount.

2. "Qualified disability trust" ("QDT") status may be available to a third-party Special Needs Trust that is **not a grantor trust** for income tax purposes. *See* IRC § 642(b)(2)(C).

a. Status as a QDT entitles the trust to the full personal exemption under IRC § 151(d) allowed to all individual taxpayers ($4,050 in 2016) as opposed to the $100 exemption under IRC § 642(b)(2)(A) allowed to an irrevocable non-grantor complex trust. The requirements for a QDT are as follows.

(1) The trust must be **irrevocable**.

(2) The trust must be established for the **sole lifetime benefit** of a person who is "disabled." (Thus it is not possible for a QDT to provide for secondary permissible beneficiaries during the lifetime of the disabled beneficiary, but it is permissible to designate remainder beneficiaries upon the death of the disabled beneficiary.)

(3) The disabled beneficiary is **under the age of 65** when the trust is established and funded.

(4) The beneficiary has been "determined by the Commissioner of Social Security to have been **disabled** (within the meaning of Section 1614(a)(3) of the Social Security Act, 42 U.S.C. 1382c(a)(3)) for some portion of the year."

(a) Thus, if the disabled beneficiary is receiving Supplemental Security Income or Social Security Disability Income, the requisite disability determination will have been made. However, there are circumstances where the disabled beneficiary is not receiving those benefits, and the QDT statute requires that the necessary disability determination be obtained through alternate means (*e.g.* as authorized by POMS SI 01150.121, or by similar provisions of a State's Medicaid program).

3. The gift tax consequences to donors of transfers to a third-party Special Needs Trust depend on whether any of the beneficiaries possess a **"right of withdrawal"** with respect to the contributed funds, commonly referred to as "Crummey powers." *See Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968). Because a gift to a trust does not generally qualify as a "present interest" for purposes of the annual gift tax exclusion under IRC § 2503(b)(1) (in 2016, $14,000 per donee), *Crummey* powers have been used for decades to convert a future interest gift to a trust into a present interest that qualifies the gift for the annual gift tax exclusion. However, it is most inadvisable to give a *Crummey* power to a beneficiary who receives means-tested government benefits, such as SSI and Medicaid, inasmuch as the value of the property that is subject to the power could well be considered "income," or an "available" or "countable" resource, to the beneficiary, thus jeopardizing his continued eligibility for those benefits.

a. Nevertheless, it is certainly possible to **grant a right of withdrawal to a secondary permissible beneficiary** of a third-party Special Needs Trust, under the rationale of *Estate of Cristofani v. Commissioner*, 97 T.C. 74 (1991). Thus, a common approach is to grant a *Cristofani* right to a non-disabled secondary beneficiary who (i) may receive distributions during the lifetime of the primary beneficiary with a disability (typically for a limited purpose such as "emergency health care"), and (ii) is a remainder beneficiary upon the death of the primary beneficiary. If the holder of the *Cristofani* right fails to exercise it, the property subject to the right remains in trust for the primary benefit of the beneficiary with the disabling condition, thus preserving his ongoing eligibility for his means-tested government benefits.

b. Granting a *Crummey* power or *Cristofani* right of withdrawal to a beneficiary who receives means-tested government benefits is a frequent **planning *faux pas*** that can be remedied by means of a judicial modification of the trust. *See* discussion, *infra*, in Section VI.D.4.

4. The estate tax consequences to the beneficiary of a third-party Special Needs Trust will depend upon whether he is vested under the trust agreement with rights or powers that cause includability for estate tax purposes (*e.g.* a general power of appointment). A third-party Special Needs Trust that is not designed to implement significant generation-skipping transfer tax planning will typically be drafted to **avoid estate tax includability** in the gross estate of the beneficiary. This is especially so since the beneficiary may be subject to Medicaid "estate recovery" at the time of his death under the provisions of one or more State Medicaid plans which have provided medical assistance benefits to him after the age of 55. Furthermore, most third-party Special Needs Trusts are drafted so that contributions thereto

qualify as completed gifts by the donor, who typically retains no beneficial interests or powers that would cause estate tax inclusion.

VI. COMMON CHALLENGES (AND SOLUTIONS) IN SPECIAL NEEDS PLANNING

Estate planning attorneys, and the myriad allied professionals with whom they work, must address numerous challenges when advising families trying to secure the future of a beneficiary with a disability and consequent special needs. Although every family is unique, there are several predictable challenges (and viable solutions) presented by each special needs planning engagement.

A. "Person-first" terminology

1. For those estate planning attorneys and allied professionals who have little experience advising families with special needs issues, one of the biggest challenges is learning, appreciating and using "person-first" terminology when referencing the beneficiary with a disability and his consequent special needs. It does not matter how technically proficient an advisor may be if he or she **alienates the client by utilizing outdated and disparaging terminology** to refer to the person with the disabling condition. Just as the "N-word" offends most people of good will, so too does the "R-word" ("retard" or "retarded"), which has only recently gained a similarly offensive status. State and federal statutes are increasingly amended to replace all forms of the "R-word" with more respectful terminology.

a. A client with the patience of Job illustrated the concept of person-first terminology for the author, as follows: "I don't have a disabled daughter; I have a daughter with a disability. She isn't "wheelchair-bound;" she uses a wheelchair to get around. She is not a "Downs child;" she's a child who has Down Syndrome. She's not "mentally retarded;" she "has a cognitive disability." Her siblings without disabilities aren't "normal;" they are "typical."

b. Using person-first terminology will seem cumbersome and unnatural at first. Clients, however *do take notice* of those who successfully integrate this concept into normal parlance. In time, the old terms that emphasized the disability first, instead of the person first, will become as offensive to the attorney, and to the other allied professionals with whom they work, as they have been to these families. This may be the easiest challenge to overcome, and will completely transform the way a family relates to, and communicates with, their professional advisors. For a quick "cheat sheet" on the proper terminology to use when referring to individuals with disabilities, see the "People First Language" handout in the Appendix. *See also* John Folkins, *Language Used to Describe Individuals with Disabilities*, American Speech-Language-Hearing Association Continuing Education Board Manual at p. 290 (Dec. 1992).[8]

B. Appropriate allocation of assets among beneficiaries with and without disabilities

1. Families often agonize over the issue of **how to divide** their estates between beneficiaries with disabilities and those who are "typical," *i.e.* without disabilities. The notion

[8] http://www.asha.org/uploadedFiles/CEB-Manual.pdf.

of a **"fair"** allocation collides with that of an **"appropriate"** allocation, considering that the beneficiaries with disabilities will likely never be fully self-supporting.

a. One extreme option, that can usually be discarded after a thoughtful discussion, is that of leaving a family's entire estate, including probate and non-probate assets, in trust for the sole lifetime benefit of the child with a disability, allowing the typical siblings to inherit only upon that child's death. This option is usually neither fair nor appropriate.

(1) Delaying the inheritance of the typical siblings until the death of their sibling with a disability will **inevitably lead to resentment** in the very people who would serve as the primary social and support network for the child with a disability after the parents are deceased. Such resentment can range in intensity from mildly dysfunctional to pathologically aberrant. The last thing that the estate planning attorney should do is to facilitate a plan that is doomed to failure on a relational level.

b. Although disinheriting the beneficiary with special needs is generally a very inadvisable option, as discussed, *supra,* in Section II, it might be an appropriate (and fair) option to consider if that beneficiary has a very large first-party Special Needs Trust funded with the proceeds of a settlement or verdict. However, many families believe that no amount of money will be sufficient to provide fully for the special needs of their children with disabilities. This is where a "Life Care Plan" can meet the challenge.

2. Developing a "Life Care Plan" for the beneficiary with special needs is an indispensable element of a realistic estate plan. Rather than just guessing as to the amount of money that will be needed to fully fund the special needs of a child with disabilities, a **Life Care Plan represents an objective, arm's length assessment** of the estimated cost. As the name implies, a Life Care Plan itemizes those medical and non-medical services, products, equipment, housing options, educational options and life-enhancing experiences from which the child with special needs will derive benefit during his estimated life expectancy, along with an economic analysis of the likely expenses and cost of same, indexed for inflation.

a. A Life Care Plan also provides an **indispensable road-map for the Trustee** of any Special Needs Trust. If there is no Life Care Plan in place at the inception of the trust, the Trustee is advised to procure one as the first order of business. If the beneficiary of a first-party Special Needs Trust has received a verdict or settlement as part of a personal injury lawsuit, the trial attorney will have obtained one or more Life Care Plans as part of that process. However, for families who have children with disabilities that are no one's fault, *e.g.* autism or Down Syndrome, they typically have never heard of a Life Care Plan.

(1) A Life Care Plan is developed by an allied professional known as a "Life Care Planner," who frequently has a medical background as a nurse, physician, or rehabilitation therapist, or as a social worker. There are several national associations that purport to "certify" Life Care Planners, but it is a generally unregulated emerging area without consistent standards. Nevertheless, a good Life Care Planner plays a critical role in answering the question **"How much is enough to leave in a Special Needs Trust** for my child with a disability?" which in turn informs the discussion about how to allocate a client's estate between beneficiaries with and without disabilities.

3. Consider **an equal allocation of probate assets coupled with an augmentation of non-probate assets** for the beneficiary with special needs. Clients are often concerned about memorializing (in their Wills or Revocable Living Trusts) an unequal allocation of assets among their children. They perceive that these documents are preserved in black and white for all eternity, and for all to see and read (and re-read) for decades. An easy solution to this concern is to **augment the equal probate share of the child with special needs** by means of non-probate assets that pass pursuant to a beneficiary designation form, which typically is not preserved for posterity in the same fashion as a Will. Using life insurance (owned by and payable to an Irrevocable Life Insurance Trust with embedded Special Needs Trust provisions) to fund an appropriate augmentation of the beneficiary's share of probate assets is a viable solution for most clients.

C. Coordinating gifts, bequests and distributions for a beneficiary receiving means-tested benefits

1. As noted above, utilizing third-party Special Needs Trusts is the cornerstone of securing the financial future of a beneficiary who is receiving means-tested benefits to help fund the cost of his care and other needs. **A special needs estate plan will typically include a network of several third-party Special Needs Trusts** for the beneficiary with a disability, including the following.

a. A **testamentary** third-party Special Needs Trust under the Will or Revocable Living Trust of each parent may be the foundation of a Special Needs Plan.

b. An ***inter vivos*** third-party Special Needs Trust **designed to receive bequests** from other family members or friends who want to help secure the financial future of the beneficiary is an indispensable element of an effective Special Needs Plan. These generous third parties are advised of this option by means of a "Dear Family and Friends Letter."

(1) The **"Dear Family and Friends Letter"** will describe the Special Needs Planning that has been undertaken for the benefit of the beneficiary, and the ultimate goal of preserving his means-tested government benefits. The letter will then provide the precise verbiage necessary to "incorporate by reference" the provisions of the *inter vivos* third-party Special Needs Trust that is ready and waiting to receive "pour-over" testamentary bequests or other post-death transfers for the benefit of the beneficiary. The letter will also include a strong caveat that any potential benefactor should seek independent legal or tax advice from his professional advisors prior to implementing any proposed transfer to the trust.

c. Many families also wish to include an *inter vivos* third-party Special Needs Trust **designed to receive lifetime gifts that will qualify for the gift tax annual exclusion** by vesting *Cristofani* rights of withdrawal in secondary permissible beneficiaries (and remaindermen) but *not* in the primary beneficiary receiving means-tested benefits. *See* discussion, *supra,* in Section V.B.3.a. A "Dear Family and Friends Letter" should also be prepared for this type of gifting trust, with specific instructions about how the right of withdrawal process works.

(1) Drafting attorneys may need to engage in creative drafting designed to accommodate the increasingly complicated wishes of clients regarding the disposition of any assets remaining in the trust at the death of the beneficiary with a disability. To avoid a

multiplicity of trusts to accommodate the wishes of different donors regarding their preferred remainder beneficiaries, it is possible to draft provisions that require **"tracking" the contributions from different donors** so that any remainder passes solely to persons designated by that donor. The success of such an approach may also require the drafting attorney to prepare instructions to the Trustee that generally require *pro rata* usage of the various internal "funds" (all with different remainder beneficiaries) established within the trust (although exceptions might be considered, *e.g.*, if necessary to minimize the transfer tax consequences to the trust beneficiaries).

d. Almost every family will need an *inter vivos* third-party Special Needs Trust **designed as an "accumulation trust" to serve as the "Designated Beneficiary"** of an IRA, 401(k) or other qualified plan account, which is in compliance with all of the requirements set forth in Treas. Reg. § 1.401(a)(9)-4.

e. Many families also require an **Irrevocable Life Insurance Trust with embedded third-party Special Needs Trust provisions** designed to own, and be the designated beneficiary of, one or more single life or second-to-die policies insuring (typically) the parents of the beneficiary with special needs. Although the beneficiary with special needs should not hold a *Crummey* power, secondary permissible beneficiaries (and remaindermen) can hold *Cristofani* rights of withdrawal to facilitate the gift tax-efficient funding of the premiums for any policies owned by the Trust.

f. It is possible to **facilitate charitable planning** by designating a third-party Special Needs Trust as the income beneficiary of a Charitable Remainder Trust ("CRT") (either a Charitable Remainder Annuity Trust ("CRAT") or a Charitable Remainder Unitrust ("CRUT")) with a stated term not exceeding 20 years. The CRT would be funded ideally with appreciated property during the donor's lifetime or at death with a qualified retirement account. Under IRC § 7701(a)(1), a third-party Special Needs Trust would qualify as a permissible CRT income beneficiary. At the end of the CRT term (not to exceed 20 years), the remainder could pass to a charitable organization which may have provided a meaningful support to the family of the beneficiary, or which is devoted to the specific disabling condition with which the beneficiary is challenged.

(1) Designing the third-party Special Needs Trust as a "Qualified Disability Trust" (discussed in Section V.B.2., *supra*) can help ameliorate the income tax consequences of annual CRT distributions to the Special Needs Trust, as will distributions from the Special Needs Trust for the benefit of the beneficiary which will "carry out" to the beneficiary for income tax reporting purposes income that would otherwise be taxable to the Special Needs Trust at its compressed rates (as discussed in Section V.B.1., *supra*).

2. A Special Needs Estate Plan should also include one or more first-party Special Needs Trusts. Notwithstanding the best efforts of the estate planning attorney and allied professionals to utilize the above-described network of third-party Special Needs Trusts to coordinate financial benefits for the beneficiary with special needs, something *always* slips through the cracks. Following are some of the more common scenarios.

a. The **well-intentioned generosity of a friend or family** member who (i) leaves an outright bequest to the beneficiary, (ii) makes an outright lifetime gift to the beneficiary, (iii) dies intestate with the beneficiary entitled to share in the estate as an heir-at-

law, or (iv) designates the beneficiary as a direct payee of a non-probate asset, can wreak havoc on a beneficiary's eligibility for means-tested government benefits.

b. If the **beneficiary becomes entitled to receive benefits** as a contingent or default taker of a non-probate asset when the primary beneficiary predeceases the owner of the asset, this can jeopardize his means-tested benefits.

(1) If a beneficiary receiving means-tested government benefits is legally entitled to receive any of the property described in a. or b., **a "Qualified Disclaimer"** under IRC § 2518 by, or on behalf of, the beneficiary **is *not effective* to** avoid an interruption or termination of those benefits. *See* POMS SI 01150.110.E. Although the disclaimer may be effective for transfer tax purposes, and valid under State law to convey title to the disclaimed asset to another person, the disclaimant's means-tested benefits will be adversely impacted.

c. If the beneficiary with special needs **wins the lottery** or another significant cash prize, the value of this windfall often pales in comparison to the value of the means-tested government benefits that can be lost as a consequence thereof.

d. If the beneficiary becomes legally entitled to receive **child support or alimony** payments as a consequence of divorce, this may disqualify him from ongoing eligibility for means-tested benefits if not properly coordinated with his Special Needs Planning.

e. The balance in a beneficiary's Representative Payee account (*i.e.* which receives direct deposits of his SSI, SSDI or CDB cash payments each month) may occasionally approach the $2,000 resource limit for means-tested benefits, resulting in his being "over-resourced" and thus jeopardizing ongoing eligibility for such benefits (*see* discussion, *supra*, at Section IV.A.1.a.(2)(a)). POMS GN 00602.075.C.1 would allow the **transfer of such "excess" funds in the Representative Payee account to a trust** for the sole benefit of the beneficiary "established exclusively for the use and benefit of the beneficiary to meet the beneficiary's current and reasonably foreseeable needs."

f. In each of the above situations, having a **first-party Special Needs Trust available on "stand-by," on a pre-need basis**, provides a ready solution for disposing of the beneficiary's asset in a manner that will not jeopardize his means-tested government benefits. It is especially important to secure the execution of a first-party Special Needs Trust while at least one of the beneficiary's parents (or grandparents) is still living. As discussed, *supra*, in Section III.B.2.a., the federal enabling statute currently specifies the permissible Settlors of a first-party Special Needs Trust, including the beneficiary's parents, grandparents, legal Guardian of the Property or Conservator, or a court. If the beneficiary cannot qualify for a Guardian or Conservator under relevant State statutes (*e.g.* he is "disabled" within the meaning of the Social Security Act, but he is also mentally competent), having the beneficiary's parent (or grandparent) establish a first-party Special Needs Trust as a "seed trust" (authorized by POMS SI 01120.203.B.1.f) as part of their estate planning is an elegant pre-need solution to an inevitable problem.

(1) If the beneficiary is, in fact, an incapacitated adult (or a minor) when he becomes legally entitled to financial benefits such as those listed above, it is likely that a **court procedure will be necessary to authorize the transfer** of those assets into a first-party Special Needs Trust established on a pre-need basis. Furthermore, any assets that

remain in a **Conservatorship are "available"** or "countable" resources for purposes of the ward's eligibility for means-tested government benefits. *See* POMS SI 01140.215.B.1.

(2) In Ltr. Rul. 200620025 an adult child with a disability, and receiving means-tested government benefits, was designated as the direct beneficiary of a share of his deceased father's IRA. In order to preserve his means-tested government benefits, the son's legal Guardian petitioned a court of competent jurisdiction for authority to (i) **create a first-party Special Needs Trust, and (ii) fund it with the beneficiary's share of the inherited IRA**. The Service held that the first-party Special Needs Trust was a "grantor trust" for federal income tax purposes under IRC § 677(a). Thus, since a grantor trust is disregarded for income tax purposes, the Service held that the funding of the trust with the beneficiary's share of the inherited IRA was not a transfer for purposes of IRC § 691(a)(2). This conclusion remained the same even after the beneficiary's share of the inherited IRA was transferred, by means of a trustee-to-trustee transfer, to a new IRA set up and maintained in the name of the deceased IRA owner to benefit the son through his first-party Special Needs Trust. Finally, the Service held that required minimum distributions from the new IRA to the first-party Special Needs Trust could be calculated using the son's life expectancy.

(3) If the beneficiary of a first-party Special Needs Trust which is established by his parents on a pre-need basis as part of their estate plan happens to have testamentary capacity at that time, consider seeking input from the beneficiary as to who he would like to receive any assets remaining in the trust after any Medicaid "payback" is satisfied.

g. Rev. Rul. 2002-20, 2002-1 CB 794 (4/26/02), holds that a CRUT is qualified under IRC § 664 if the **unitrust amount is paid to a separate first-party Special Needs Trust for the lifetime benefit of an individual who is "financially disabled"** as defined in IRC § 6511(h)(2)(A), and that individual has a testamentary general power of appointment over the balance remaining in the Special Needs Trust after the Medicaid payback. Thus, the 20-year term limitation required for a CRT when a third-party Special Needs Trust is designated as the income beneficiary (discussed, *supra*, in Section VI.C.1.f) does not apply to such a first-party Special Needs Trust unitrust recipient. **"Financially disabled" is defined** as "unable to manage [the individual's] financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." The Ruling holds that the use of the assets in such a first-party Special Needs Trust "is consistent with the manner in which [the beneficiary's] own assets would be used. [The beneficiary], therefore, is considered to have received the unitrust amounts directly" from the CRUT for purposes of IRC § 664 (d)(2)(A). "Accordingly, the term of the [CRUT] may be for the life of [the beneficiary of the first-party Special Needs Trust] and is **not limited to a term of years**. The same result would apply if the [CRUT] were a charitable remainder annuity trust."

(1) Caveat: Rev. Rul. 2002-20 does not mention the provisions of IRC § 6511(h)(2)(B), which states that "An individual shall not be treated as financially disabled during any period that such individual's spouse or any other person is authorized to act on behalf of such individual in financial matters." *Query* whether the mere existence of a court-appointed Conservator for the individual or an attorney-in-fact under the individual's Durable Power of Attorney for financial matters (which many beneficiaries of first-party Special Needs Trusts do indeed have) would render this charitable planning opportunity unavailable.

D. Pre-existing trusts with "support" or "maintenance" distribution standards

Inasmuch as special needs estate planning is a relatively new sub-specialty, practitioners are frequently confronted with **older irrevocable trusts** that utilize the classic ascertainable standards of "health, education, maintenance and support" for all beneficiaries. As noted, *supra*, in Section III.F.1.a., if a trust beneficiary is receiving means-tested government benefits, such as SSI and Medicaid, the **"support" and "maintenance"** distribution standards typically result in the trust assets being deemed **"available" or "countable"** to the beneficiary, thus jeopardizing those benefits. The distribution standards found in most "Bypass/Credit Shelter" Trusts, and many "Dynasty/Generation-Skipping" Trusts, threaten to disqualify the beneficiary with a disability from ongoing eligibility for means-tested government benefits. Options to deal with this challenge may include the following.

1. If the original trust grants the **power to amend** the trust provisions, the exercise of that power (by someone other than the beneficiary with special needs) is an unexpectedly easy solution.

2. The exercise of a **power of appointment** (by someone other than the beneficiary with special needs) in favor of a newly-created third-party Special Needs Trust can often solve the problem if the provisions allow for the appointment of trust assets to, "or for the benefit of," the beneficiary, including "in further and separate trust."

3. A **"decanting" encroachment** by the Trustee into a newly-created third-party Special Needs Trust is another frequently utilized solution. Although not all States currently have decanting statutes, well-respected practitioners who have thoroughly considered this topic have concluded that the "common law of every state likely confers decanting authority on trustees." *See* Jonathan G. Blattmachr, Jerold I. Horn & Diana S.C. Zeydel, *An Analysis of the Tax Effects of Decanting*, 47 Real Prop. Tr. & Est. L.J. 141, 170 (Spring 2012).

4. A **judicial modification** of the original trust which replaces the "support" and "maintenance" standards with Special Needs Trust provisions with respect to any distributions for the benefit of the beneficiary receiving means-tested government benefits is an expensive and labor-intensive option. State law typically provides specific procedures for the judicial modification of irrevocable trusts, which are designed to uphold the intent of the person who established the trust and to effectuate the purpose of the trust. It is typically necessary to craft and support the position that **had the creator of the trust known** that its original provisions for the beneficiary with the disability would disqualify him from ongoing eligibility for a significant source of funding his special needs (*i.e.* means-tested government benefits) the creator would have taken the steps needed to modify those provisions accordingly by replacing them with Special Needs Trust provisions. The trust modification petition **typically addresses the following issues.**

a. A statement of proper jurisdiction and venue.

b. A complete list of all interested parties, including the Trustee(s), the trust beneficiaries (both current and remainder), and any Guardian ad Litem who may need to be appointed to represent the interests of any unknown or unborn trust beneficiaries, or the beneficiary with the disability if he is not mentally competent.

c. A complete description of the original trust provisions in favor of the beneficiary with special needs (and the other trust beneficiaries).

d. A description of the facts and circumstances surrounding the creation of the trust, supported by appropriate affidavits of those persons with actual knowledge of same.

e. A discussion of the beneficiary's disabling condition, and whether the person who created the original trust was aware of the disabling condition and the consequent special needs of the beneficiary.

f. The exact type of government benefits for which the beneficiary is eligible, which would be reduced or eliminated if the original "support" and "maintenance" distribution standards are not replaced with Special Needs Trust provisions. Note: insist on seeing the actual "benefits award letter" which describes the beneficiary's government benefits, since many families do not know or appreciate the difference between means-tested and employment-related benefits.

g. Citations to the relevant state and federal law that supports the proposition that the "support" and "maintenance" standards in the original trust will disrupt or eliminate the beneficiary's means-tested government benefits.

h. A discussion of the intent of the creator of the original trust to benefit the beneficiary with special needs by creating the trust, and how that intent, or the accomplishment of the purpose of the original trust, would be defeated, or substantially impaired, if the original provisions remain unmodified, supported by affidavits of persons familiar with the creator's intent and/or an affidavit from an attorney, or other allied professional, who routinely works with similarly-situated clients.

i. A discussion of how the proposed trust modification will uphold the intent of the person who created the original trust, and the accomplishment of the purpose of the trust, by (i) allowing the beneficiary's eligibility for means-tested government benefit programs to continue, and (ii) allowing the modified trust to supplement, and not supplant, those government benefits.

j. An analysis of the beneficiary's life expectancy; the insufficiency of the assets of the original trust to fund fully all of his health care and disability-related special needs for the balance of his lifetime; and the need for government benefit programs to supplement the trust assets to fund fully those needs.

k. A discussion of **whether the State's Medicaid plan will require a "payback" provision** to be included in the modified trust, notwithstanding the status of the original trust as a third-party trust (which would normally not be required to include a Medicaid payback provision, as discussed, *supra,* in Section III.C.2). Some states take the position that a trust which would have been considered an "available" or "countable" asset as originally drafted must include a payback provision in the modified version only if the creator made no reference whatsoever to the beneficiary's disabilities. The States are reportedly very inconsistent with regard to requiring the inclusion of a Medicaid payback provision in a modified third-party Special Needs Trust.

(1) If a Medicaid payback provision is required in the modified trust, and if there are other current or remainder beneficiaries of the trust whose beneficial interests would be adversely impacted by the satisfaction of the payback from the property remaining in the trust upon the death of the beneficiary with special needs, then the family should consider other available sources of liquidity (*e.g.* life insurance) for satisfying the payback. Medicaid cares only that its payback right is satisfied, not the source of the funds with which it is satisfied. This is also especially problematic if the major asset of the modified trust is illiquid or otherwise "sacred" to the beneficiaries, such as the Family Homeplace or some other sentimental asset which they do not wish to liquidate upon the death of the beneficiary with special needs to satisfy the Medicaid payback.

5. The Trustee of an irrevocable trust that contains problematic distribution standards for a beneficiary who receives means-tested government benefits could also consider a **complete encroachment to the beneficiary** of the entire trust corpus, followed by an **immediate funding of a first-party Special Needs Trust** with that property. This approach would necessarily entail subjecting the property to a Medicaid payback; however, if the corpus is likely to be depleted entirely (or in large part) during the beneficiary's lifetime, the payback prospect is of little consequence. If the beneficiary is a minor or an incapacitated adult under relevant State law, it would be necessary to obtain court approval for the transfer of the encroached assets into the first-party Special Needs Trust. Furthermore, every effort should be made to time the encroachment to the beneficiary and the funding of the first-party Special Needs Trust in the same month so that his eligibility for means-tested benefits is adversely impacted for only a single month.

E. Lack of a "Special Needs Team" of allied professionals

Families trying to secure the future of beneficiaries with disabilities already realize that this requires a team effort. The estate planning attorney is ideally suited to help the client assemble this Special Needs Team as part of the estate planning process. The members of a typical Special Needs Team should include, at a minimum, the following professionals.

1. An **estate planning attorney** who is familiar with the myriad issues involved in advising families with special needs, or who is willing to obtain and work with co-counsel who is experienced in this area. There are two national organizations whose members are proficient in the special needs space: the Special Needs Alliance[9] and the Academy of Special Needs Planners.[10]

2. A **Life Care Planner**, discussed, *supra*, in Section VI.B.2.a.(1).

3. A **Care Manager**, who prepares a personal care plan for the beneficiary; coordinates the beneficiary's caregivers and oversees the implementation of the plan; and personally periodically verifies the quality of care being rendered to the beneficiary.

4. A **government benefits specialist** who can assist the family with applying for the various programs for which the beneficiary may be eligible as a consequence of his disability. Many benefits applications are derailed because of a family's unfamiliarity with the

[9] http://www.specialneedsalliance.org/.

[10] http://www.specialneedsplanners.com/.

forms or the process, or because of the failure to adequately document the disabling condition from a medical or functional limitation standpoint. This professional can often also advise the Trustee of a Special Needs Trust as to whether any proposed trust disbursements will adversely impact the beneficiary's means-tested benefits.

5. If the beneficiary with special needs is of school age, a **special education advocate** can help the family obtain the "free appropriate public education" to which he is legally entitled. Under the Federal "Individuals with Disabilities Education Act" ("IDEA"), the educational program for a child with a disability must be designed to prepare him or her for further education, employment and independent living, as outlined in an "Individualized Education Program" ("IEP") tailored to the child's specific and unique needs. *See* 20 U.S.C. § 1400 *et seq.* There is a small, but growing, cadre of attorneys who limit their practice to advising and representing parents in special education hearings under the IDEA, since many public school systems fail or refuse to provide the free appropriate public education guaranteed by IDEA.

6. Accountants who are well-versed in preparing tax returns for Special Needs Trusts, the beneficiaries thereof, and the parents or legal guardians of the beneficiaries who are funding the costs of their medical care and other needs. Many accountants are unfamiliar with Special Needs Trust taxation rules, or with the myriad expenditures that qualify as medical expenses. *See supra* Section V.A.2.c.

a. In addition to income tax returns for Special Needs Trusts, several states require **annual "accountings" to the State Medicaid plan** which detail the receipts and disbursements of a Special Needs Trust, both first-party and third-party. For example, the Georgia Medicaid plan has established a first-of-its-kind "Trust Review and Accounting Program" administered by Health Management Systems (a publicly-traded national corporation that provides healthcare cost containment services to both state and federal agencies). This program has already been replicated in Alabama, Iowa and North Carolina. Reviews of these annual trust accountings focus on **potential violations of the "sole benefit rule"** applicable to first-party Special Needs Trusts (*see* Section III.B.2.c.(2), *supra*) as well as disbursements from first-party and third-party Special Needs Trusts that constitute **"In-Kind Support and Maintenance"** that adversely impact the beneficiary's Supplemental Security Income monthly payment (*see* Section IV.A.(2)(b)(3), *supra*). Most accountants are not ideally suited for the preparation of these annual accountings, which can be prepared more cost-effectively by a paralegal or bookkeeper.

7. Investment advisors who are sensitive to the generally low risk tolerance of beneficiaries with disabilities, and understand how a beneficiary's specific disability impacts a portfolio allocation, *e.g.* a compromised life expectancy and the costs of funding his Life Care Plan.

8. Life insurance professionals who understand the process of determining the expected cost of a Life Care Plan, and can recommend creative strategies for funding that cost taking into account all of the other resources available to the beneficiary, including his parents, siblings or other support network, as well as the various government benefit programs for which he may be eligible as a consequence of his disabilities.

9. An **appropriate Trustee**, and successors, for the various Special Needs Trusts which will form the cornerstone of the beneficiary's financial security. Serving as the Trustee of a Special Needs Trust is not for the faint-of-heart. Even well-intentioned, motivated family members risk sabotaging a perfect plan if they improperly administer the Special Needs Trust for which they are responsible. If those family members also happen to be the remainder beneficiaries of the Special Needs Trusts, then (human nature being what it is), it is quite possible that the beneficiary will not benefit as the client intended. Thus, an independent or professional Trustee is highly recommended for Special Needs Trusts.

a. Unfortunately, many professional or corporate Trustees have **very high minimums** for all trust accounts (and perhaps even higher minimums for Special Needs Trusts in recognition of the labor-intensive nature of their administration) which often preclude this option for many clients. Even more regrettable are the increasing numbers of corporate Trustees (which shall remain nameless) that categorically refuse to accept Special Needs Trusts of any size. Increasingly, attorneys, accountants, former trust officers and other allied professionals are offering **private fiduciary services** for Special Needs Trust administration with no, or a relatively low, minimum account threshold. These "allied professionals" are also often available to serve as **"distribution advisors"** to those Trustees (individual or corporate) who are not well-versed in the myriad rules and restrictions applicable to disbursements from Special Needs Trusts.

10. Last, but not least, the **legal Guardian** of a beneficiary with special needs will eventually serve as the **"quarterback" of the Special Needs Team,** after the beneficiary's natural parents are deceased. Many clients are paralyzed with fear by the prospect that (i) no one will agree to serve as Guardian for their children with disabilities because of the monumental task it represents, and (ii) anyone who does agree to serve will not do it as well as they have done. Assembling the Special Needs Team as part of the estate planning process provides a solution to both of these concerns.

a. If a person nominated under the client's Will to serve as Guardian of the client's child with a disability believes that he must personally undertake the responsibilities of all of the Team members listed above, the client's fear would be justified. However, if the nominated Guardian were able to view his role as the "quarterback" of those allied professionals, with a **division of labor agreed upon in advance**, then serving as Guardian would not seem nearly as daunting.

b. If the members of the Special Needs Team are identified and assembled while the parents of the beneficiary are still living, then the parents can take an active role in communicating their expectations so that, working together, the Team members may indeed do as well as the parents have done. Each Team member can be given appropriate opportunities to interact with the beneficiary, his parents, and each other, before the parents' demise. Instead of losing the history of care and love which the parents have left as part of their legacy, the **Team members are made a part of that history**.

c. Assembling the members of the Special Needs Team while the parents of the beneficiary are still living can also facilitate a more **accurate analysis of the cost** of procuring the services of the Team members in the future. If, as is often the case, the likely cost exceeds the clients' wildest nightmares, steps can be taken to bridge any funding gap that may exist.

d. For various reasons, the natural parents of adult children with disabilities often **fail or refuse to secure the appointment of a legal Guardian** for them. Psychologically, such parents simply cannot bear the thought of a process that necessarily emphasizes the areas in which their adult children remain vulnerable and unable to take care of their own health and personal safety. Such parents have spent their whole lives emphasizing their children's abilities (however modest), and refuse to focus realistically on what they cannot do. Third parties often enable this "head-in-the-sand" approach as long as one of the natural parents of the adult child with a disability is still living, operating on a "wink-wink" basis (and often violating the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") in the process). Needless to say, this is an imprudent approach which can risk the health and well-being of the adult child with the disability if, for example, a catastrophic health care emergency were to arise and a doctor unfamiliar with the family insisted on Letters of Guardianship before taking any directions regarding the child's course of care.

Conclusion

Vast numbers of estate planning attorneys and allied professionals are finally taking steps to become educated about (and perhaps proficient in addressing) the myriad issues implicated by the special needs of their clients with disabling conditions. Each year hundreds of articles, treatises and conferences are made available to help practitioners keep abreast of developments in this ever-changing area of the law. *See, e.g.*, Katherine N. Barr, Richard E. Davis & Kristen M. Lewis, *Top 15 Tips for Estate Planners When Planning for Special Needs*, 24 Prob. & Prop. 38 (Mar./Apr. 2010).[11] Advising clients with special needs is fraught with challenges, but the personal and professional rewards for successful planning are unparalleled.

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[11] http://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v24/02/2010_aba_rpte_pp_v24_2_mar_apr_barr_davis_lewis.authcheckdam.pdf.

ADVANCED SPECIAL NEEDS TRUSTS:

PLANNING FOR BENEFICIARIES WITH SPECIAL NEEDS

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APPENDIX

- POMS SI 01120.200

  Trusts – General, Including Trusts Established with Assets of Third Parties

- POMS SI 01120.201

  Trusts Established With Assets of an Individual on or after 1/1/00

- POMS SI 01120.203

  Exceptions to Counting Trusts Established on or after 1/1/00

- POMS SI 01120.199

  Early Termination Provisions and Trusts

- "People First Language" reprinted with express permission of the Texas Council for Developmental Disabilities

- Sample First-Party Special Needs Trust Agreement*

- Sample Third-Party Special Needs Trust Agreement*

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SI 01120.200 Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act

Topic	Reference
Introduction to Trusts	SI 01120.200A
Glossary of Terms – Trusts	SI 01120.200B
Policy – Accounts That May Or May Not Be Trusts	SI 01120.200C
Policy – Trusts As Resources	SI 01120.200D
Policy - Disbursements From Trusts	SI 01120.200E
Policy – Home Ownership/Purchase Of A Home By A Trust	SI 01120.200F
Policy – Earnings/Additions To Trusts	SI 01120.200G
Policy – Medicaid Trusts And Medicaid Qualifying Trusts	SI 01120.200H
Policy – Representative Payees And Trusts	SI 01120.200I
Procedure – Development And Documentation of Trusts	SI 01120.200J
Procedure – Discussing SSI Trust Policy With The Public	SI 01120.200K
Examples of Trusts	SI 01120.200L
References	SI 01120.200M

A. Introduction to trusts

1. General

A trust is a legal arrangement involving property and ownership interests. Property held in trust may or may not be considered a resource for SSI purposes. The general rules concerning resources apply to evaluating the resource status of property held in trust.

2. Applicability of this section

Generally, this section applies to trusts not subject to the statutory trust provisions in Section 1613(e) of the Social Security Act, instructions for which are found in SI 01120.201 – SI 01120.204. Use the instructions in this section to evaluate the following types of trusts:

a. Trusts established prior to 1/1/00 that contain assets of the individual

Trusts established before 1/1/00 that contain assets of the individual, any of which were transferred before 1/1/00. If the trust was established prior to 1/1/00, but no assets of the individual were transferred to the trust prior to 1/1/00, see SI 01120.201.

b. Trusts that contain assets of third parties

- Trusts established before 1/1/00 that contain assets of third parties.
- Trusts established on or after 1/1/00 that contain only assets of third parties or the portion of a commingled trust attributable to assets of third parties. (Trusts established on or after 1/1/00 that contain assets of a Supplemental Security Income (SSI) claimant or recipient or the portion of a commingled trust attributable to assets of an SSI claimant or recipient must be evaluated under SI 01120.201 through SI 01120.204.)

c. Other trusts not subject to Section 1613(e) of the Social Security Act

Trusts established on or after 1/1/00 to which the instructions in SI 01120.201 – SI 01120.204 do not apply. (The instructions in those sections will refer you back to this section, where applicable.)

3. Case processing alert

Trusts are often complex legal arrangements involving State law and legal principles that a claims representative (CR) may not be able to apply without legal counsel. Therefore, the following instructions may only be sufficient for you to recognize that an issue is present that should be referred to your regional office (RO) for possible referral to the Regional Chief

Counsel. When in doubt, discuss the issue with the RO staff. Many issues can be resolved by phone.

B. Glossary of terms -- Trusts

1. Trust

A **trust** is a property interest, whereby, property is held by an individual or entity (such as a bank) called the trustee, subject to a fiduciary duty, to use the property for the benefit of another (the beneficiary).

2. Grantor

A **grantor** (also called a settlor or trustor) is the individual who provides the trust principal (or corpus). The grantor must be the owner or have legal right to the property or be otherwise qualified to transfer it. Therefore, an individual may be a grantor even if an agent or other individual, legally empowered to act on his or her behalf (e.g., a legal guardian, representative payee for Title II/XVI benefits, person acting under a power of attorney, or conservator), establishes the trust with funds or property that belong to the individual. The individual funding the trust is the grantor, even in situations where the trust agreement shows a person legally empowered to act on the individual's behalf as the grantor. Where more than one person provides property to the trust, there may be multiple grantors. The terms grantor, trustor, and settlor may be used interchangeably.

3. Trustee

A **trustee** is a person or entity who holds legal title to property for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for his or her own benefit.

4. Trust beneficiary

A **trust beneficiary** is a person for whose benefit a trust exists. A beneficiary does not hold legal title to trust property but does have an equitable ownership interest in it. As equitable owner, the beneficiary has certain rights that will be enforced by a court because the trust exists for his or her benefit. The beneficiary receives the benefits of the trust while the trustee holds the title and duties.

5. Trust principal

The **trust principal** is the property placed in trust by the grantor which the trustee holds, subject to the rights of the beneficiary, and includes any trust earnings paid into the trust and left to accumulate. Also called "the corpus of the trust."

6. Trust earnings (income)

Trust earnings or income are amounts earned by the trust principal. They may take such forms as interest, dividends, royalties, rents, etc. These amounts are unearned income to any person legally able to use them for personal support and maintenance.

7. Totten trust

A **Totten trust or "bank account trust"** is a tentative trust in which a grantor makes himself or herself trustee of his or her own funds for the benefit of another. Typically this is done by an individual depositing funds in a savings account and either titling the account or filing a writing with the bank indicating he or she is trustee of the account for another person. The trustee can revoke a Totten trust at any time. Should the trustee die without revoking the trust, ownership of the money passes to the beneficiary. Totten trusts are valid in most jurisdictions, but other jurisdictions have held them invalid because they are too tentative, i.e., they lack formal requirements and do not state a trust intent or purpose.

8. Grantor trust

Subject to State law, a **grantor trust** is a trust in which the grantor of the trust is also the sole beneficiary of the trust. See SI 01120.200B.2. for who may be a grantor. State law on grantor trusts varies. Consult with your regional office, if necessary.

9. Mandatory trust

A **mandatory trust** is a trust that requires the trustee to pay trust earnings or principal to or for the benefit of the beneficiary at certain times. The trust may require disbursement of a specified percentage or dollar amount of the trust earnings or may obligate the trustee to spend income and principal, as necessary, to provide a specified standard of care. The trustee has no discretion as to the amount of the payment or to whom it will be distributed.

10. Discretionary trust

A **discretionary trust** is a trust in which the trustee has full discretion as to the time, purpose and amount of all distributions. The trustee may pay to, or for the benefit of, the beneficiary,

all or none of the trust as he or she considers appropriate. The beneficiary has no control over the trust.

11. Medicaid trust or Medicaid qualifying trust

See SI 01730.048 for definitions of a **Medicaid trust** or a **Medicaid qualifying trust**, and see SI 01120.200H for additional guidance on these trusts. See SI 01120.203 for SSI treatment of Medicaid trust exceptions.

12. Residual beneficiary

A **residual beneficiary** (also referred to as a **contingent beneficiary**) is not a current beneficiary of a trust, but will receive the residual benefit of the trust contingent upon the occurrence of a specific event, e.g., the death of the primary beneficiary.

13. Supplemental needs trust

A **supplemental needs trust** is a type of trust that limits the trustee's discretion as to the purpose of the distributions. This type of trust typically contains language that distributions should supplement, but not supplant, sources of income including SSI or other government benefits.

14. Inter Vivos Trust

An **inter vivos trust** is a trust established during the lifetime of the grantor. It may also be called a living trust.

15. Testamentary trust

A **testamentary trust** is a trust established by a will and effective at the time of the testator's death.

16. Spendthrift clause or spendthrift trust

A **spendthrift clause or trust** prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. This means that the beneficiary's creditors must wait until money is paid from the trust to the beneficiary before they can attempt to claim it to satisfy debts. It also means that, for example, if the beneficiary is entitled to $100 a month from the trust, the beneficiary cannot sell his or her right to receive the monthly payments to a third party for a lump sum. In other words, a valid spendthrift

clause would make the value of the beneficiary's right to receive payments not countable as a resource. However, spendthrift clauses are not recognized in all States. Additionally, States that recognize spendthrift trusts generally do not allow a grantor to establish a spendthrift trust for his or her own benefit, i.e., as a beneficiary. Thus, using the example from above, in those States where spendthrift clauses are not recognized (whether at all or because the trust is a grantor trust), the value of the beneficiary's right to receive monthly payments should be counted as a resource because it may be sold for a lump sum.

17. Third-party trust

A **third-party trust** is a trust established with the assets of someone other than the beneficiary. For example, a third-party trust may be established by a grandparent for a grandchild. Be alert for situations where a trust is allegedly established with the assets of a third party, but in reality is created with the beneficiary's property. In such cases, the trust is a grantor trust, not a third-party trust.

18. Fiduciary duty

Fiduciary duty is the obligation of the trustee in dealing with the trust property and income. The trustee holds the property solely for the benefit of the beneficiary with due care. The trustee owes duties of good faith and loyalty to exercise reasonable care and skill, to preserve the trust property and make it productive and to account for it. Because the trustee is a fiduciary does not mean that he or she is an agent of the beneficiary. The person who establishes a trust should not be confused with the grantor, who provides the assets that form the principal of the trust.

19. Revoke

The grantor of a trust may have the power or authority to **revoke** (i.e., reclaim or take back) the assets deposited in the trust. If the individual at issue (a claimant, recipient, or deemor (see SI 01310.127)) is the grantor of the trust, the trust will generally be a resource to that individual if that individual can revoke the trust and reclaim the trust assets. However, if a third party is the grantor of the trust, the trust will not be a resource to the beneficiary of the trust merely because the trust is revocable by the grantor. In a third-party trust situation, the focus should be on whether the individual (claimant, recipient, or deemor) can terminate the trust and obtain the assets for himself or herself.

20. Terminate

In rare instances, a trustee or beneficiary of a third-party trust (i.e., a trust established with the assets of a third party) can **terminate** (i.e., end) a trust and obtain the assets for himself or herself.

C. Policy accounts that may or may not be trusts

1. Accounts that are not trusts

The following accounts and instruments are similar to trusts and may be titled as trusts, but should generally not be developed under these instructions for SSI purposes:

a. Conservatorship accounts

These accounts, established by a court, are usually administered by a court-appointed conservator for the benefit of an individual. They differ from a trust in that the "beneficiary" retains ownership of all of the assets, although in some cases they may not be available for support and maintenance. (See SI 01140.215 for instructions pertaining to conservatorship accounts.)

b. Patient trust accounts

Many nursing homes, institutions and government social services agencies maintain so-called "patient trust accounts" for individuals to provide them with toiletries, cigarettes, candy and sundries. Although titled trust accounts, they are not; they are agency accounts. The individual owns the money in the account, which the institution is merely holding for him or her and making disbursements on his or her behalf as necessary. (See SI 01120.020, SI 00810.120 and GN 00603.020 for information on transactions involving agents.)

2. "In Trust For" financial accounts

These accounts may or may not be trusts depending on the circumstances in the individual case. Examples of the most common situations follow:

a. Representative payee accounts

One of the most common types of "in trust for" accounts are representative payee accounts. These accounts are not trusts, but improperly titled accounts that are misleading as to the actual owner of the funds. If a representative payee deposits current or conserved benefits in an account, the account must be titled to reflect the beneficiary's ownership interest. (See SI 01120.020 and SI 00810.120 for instructions pertaining to agency accounts. See GN

00603.010 for instructions pertaining to titling of accounts established by representative payees.)

b. Totten trusts

An "in trust for" financial institution account may be a Totten trust if an individual deposits his or her own funds in an account and holds the account as owner for the benefit of another individual(s).

D. Policy - trusts as resources

1. Trusts which are resources

a. Trust principal is a resource

If an individual (claimant, recipient, or deemor) has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his or her support and maintenance under the terms of the trust, the trust principal **is** a resource for SSI purposes.

Additionally, if the individual can sell his or her beneficial interest in the trust, that interest is a resource. For example, if the trust provides for payment of $100 per month to the beneficiary for spending money, absent a prohibition to the contrary (e.g., a valid spendthrift clause; see SI 01120.200B.16.), the beneficiary may be able to sell the right to future payments for a lump-sum settlement.

b. Authority to revoke or terminate trust or use assets

- **Grantor**

In some cases, the authority to revoke a trust is held by the grantor. Even if the power to revoke a trust is not specifically retained, a trust may be revocable in certain situations. (See SI 01120.200B.8. and SI 01120.200D.3. for information on grantor trusts.) Additionally, State law may contain presumptions as to the revocability of trusts. If the trust principal reverts to the grantor upon revocation and can be used for support and maintenance, then the principal **is** a resource to the grantor.

- **Beneficiary**

A beneficiary generally does not have the power to terminate a trust. However, the trust may be a resource to the beneficiary in the rare instance where he or she has the authority to terminate the trust and gain access to the trust assets. In addition, the beneficiary may, in rare

instances, have the authority under the trust to direct the use of the trust principal. (The authority to control the trust principal may be either specific trust provisions allowing the beneficiary to act on his or her own or by permitting the beneficiary to order actions by the trustee.) In such a case, the beneficiary's equitable ownership in the trust principal and his or her ability to use it for support and maintenance means it **is** a resource.

The beneficiary's right to mandatory periodic payments **may be** a resource equal to the present value of the anticipated string of payments unless a valid spendthrift clause (see SI 01120.200B.16.) or other language prohibits anticipation of payments.

While a trustee may have discretion to use the trust principal for the benefit of the beneficiary, the trustee should be considered a third party and not an agent of the beneficiary, i.e., the actions of the trustee are not the actions of the beneficiary, unless the trust specifically states otherwise.

- **Trustee**

Occasionally, a trustee may have the legal authority to terminate a trust. However, the trust is not a resource to the trustee unless he or she becomes the owner of the trust principal upon termination. The trustee should be considered a third party. Although the trustee has access to the principal for the benefit of the beneficiary, this does not mean that the principal is the trustee's resource. If the trustee has the legal authority to withdraw and use the trust principal for his or her **own** support and maintenance, the principal **is** the trustee's resource for SSI purposes in the amount that can be used.

- **Totten trust**

The creator of a Totten trust has the authority to revoke the financial account trust at any time. Therefore, the funds in the account **are** his or her resource.

2. Trusts which are not resources

If an individual does not have the legal authority to revoke or terminate the trust or to direct the use of the trust assets for his or her own support and maintenance, the trust principal **is not** the individual's resource for SSI purposes.

The revocability of a trust and the ability to direct the use of the trust principal depend on the terms of the trust agreement and/or on State law. If a trust is irrevocable by its terms and under State law and cannot be used by an individual for support and maintenance (e.g., it contains a valid spendthrift clause; see SI 01120.200B.16.), it **is not** a resource.

3. Revocability of grantor trusts

Some States follow the general principle of trust law that if a grantor is also the sole beneficiary of a trust, the trust is **revocable** regardless of language in the trust to the contrary.

However, many of these States recognize that the grantor cannot unilaterally revoke the trust if there is a named "residual beneficiary" in the trust document who would, for example, receive the principal upon the grantor's death or the occurrence of some other specific event.

Under the modern view, residual beneficiaries are assumed to be created, absent evidence of a contrary intent, when a grantor names heirs, next of kin, or similar groups to receive the remaining assets in the trust upon the grantor's death. In such case, the trust is considered to be irrevocable.

NOTE: The policies regarding grantor trusts may or may not apply in your particular State. Field offices should consult regional POMS or your regional office program staff if in doubt.

E. Policy - Disbursements from trusts

1. Trust principal is not a resource

If the trust principal is not a resource, disbursements from the trust may be income to the SSI recipient, depending on the nature of the disbursements. Regular rules to determine when income is available apply.

a. Disbursements which are income

Cash paid directly from the trust to the individual is unearned income.

Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550 and SI 01110.210).

For example, if a trust buys a car for the beneficiary and the beneficiary's spouse already has a car which is excluded for SSI, the second car is income in the month of receipt since it would not be an excluded resource in the following month.

b. Disbursements which result in receipt of in-kind support and maintenance

Food or shelter received as a result of disbursements from the trust by the trustee to a third party are income in the form of in-kind support and maintenance and are valued under the presumed maximum value (PMV) rule. (See SI 00835.300 for instructions pertaining to the PMV rule. See SI 01120.200F for rules pertaining to a home.)

c. Disbursements which are not income

Disbursements from the trust other than those described in SI 01120.200E.1.a. and SI 01120.200E.1.b. are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc., (see SI 00815.400).

Disbursements made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if those items would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550 and SI 01110.210).

For example, a trust purchases a computer for the beneficiary. Since the computer would be excluded from resources as household goods in the following month, the computer is not income (see SI 01130.430).

d. Reimbursements to a third party

Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income.

Existing income and resource rules apply to items a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of in-kind support and maintenance (ISM).

2. Trust principal is a resource

a. Disbursements to or for the benefit of the beneficiary

If the trust principal is a resource to the individual, disbursements from the trust principal received by the individual or that result in receipt of something by the individual are not income, but conversion of a resource. (However, trust earnings are income. See SI 01110.100 for instructions pertaining to conversion of resources from one form to another. See SI 01120.200G.2. for treatment of income when the trust principal is a resource and SI 00830.500 for treatment of dividends and interest as income.)

b. Disbursements not to or for the benefit of the beneficiary

If the trust is established with the assets of an individual or his or her spouse and the trust (or portion of the trust) is a resource to the individual:

- any disbursement from the trust (or from that portion of the trust that is a resource) that is not made to, or for the benefit of, the individual is considered a transfer of resources as of the date of the payment and is not considered income to the individual (see SI 01150.110); and
- any foreclosure of payment (an instance in which no disbursement can be made to the individual under any circumstances) is considered to be a transfer of resources as of the date of foreclosure. Such foreclosure is not considered income to the individual.

F. Policy - Home ownership/purchase of a home by a trust

1. Home as a resource

If the trustee of a trust which is not a resource for SSI purposes purchases and holds title to a house as a home for the beneficiary, the house would not be a resource to the beneficiary. It would also not be a resource if the beneficiary moved from the house. The trust holds legal title to the house, therefore, the eligible individual would be considered to be living in his or her own home based on having an "equitable ownership under a trust."

If the trust is a resource to the individual, the home is subject to exclusion under SI 01130.100.

2. Rent-free shelter

An eligible individual does not receive in-kind support and maintenance (ISM) in the form of rent-free shelter while living in a home in which he or she has an ownership interest. Accordingly, an individual with "equitable home ownership under a trust" (see SI 01120.200F.1.) does not receive rent-free shelter. Also, because we consider such an individual to have an ownership interest, payment of rent by the beneficiary to the trust has no effect on the SSI payment.

3. Receipt of income from a home purchase

Since the purchase of a home by a trust for the beneficiary establishes an equitable ownership interest for the beneficiary of the trust, the purchase results in the receipt of shelter in the month of purchase that is income in the form of ISM (see SI 00835.400). This ISM is valued at no more than the presumed maximum value (PMV).

Even though the beneficiary has an ownership interest in the home and, if living in the home, does not receive ISM in the form of rent-free shelter, purchase of the home or payment of the monthly mortgage by the trust is a disbursement from the trust to a third party that

results in the receipt of ISM in the form of shelter. (See SI 01120.200E.1.b.)

a. Outright purchase of a home

If the trust, which is not a resource, purchases the home outright and the individual lives in the home in the month of purchase, the home would be income in the form of ISM and would reduce the individual's payment no more than the PMV **in the month of purchase only,** regardless of the value of the home. (See SI 01120.200E.1.b.)

b. Purchase by mortgage or similar agreement

If the trust, which is not a resource, purchases the home with a mortgage and the individual lives in the home in the month of purchase, the home would be ISM in the month of purchase. Each of the subsequent monthly mortgage payments would result in the receipt of income in the form of ISM to the beneficiary living in the house, each valued at no more than the PMV (see SI 01120.200E.1.b.).

c. Additional household expenses

If the trust pays for other shelter or household operating expenses, these payments would be income in the form of ISM in the month the individual has use of the item (see SI 00835.350). Countable shelter expenses are listed at SI 00835.465D.

If the trust pays for improvements or renovations to the home, e.g., renovations to the bathroom, to make it handicapped accessible or installation of a wheelchair ramp or assistance devices, etc., the individual does not receive income. Disbursements from the trust for improvements increase the value of the resource and, unlike household operating expenses, do not provide ISM. (See SI 01120.200E.1.c.)

G. Policy – earnings and additions to trusts

1. Trust principal is not a resource

a. Trust earnings

Trust earnings are not income to the trustee or grantor **unless** designated as belonging to the trustee or grantor under the terms of the trust; e.g., as fees payable to the trustee or interest payable to the grantor.

Trust earnings are not income to the SSI claimant or recipient who is a trust beneficiary **unless** the trust directs, or the trustee makes, payment to the beneficiary.

b. Additions to principal

Additions to trust principal made directly to the trust are not income to the grantor, trustee or beneficiary. Exceptions to this rule are listed in SI 01120.200G.1.c. and SI 01120.200G.1.d.

c. Exceptions

Certain payments are non-assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. They may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. Non-assignable payments include:

- Temporary Assistance to Needy Families (TANF)/Aid to Families with Dependent Children (AFDC);
- Railroad Retirement Board-administered pensions;
- Veterans' pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security title II and SSI payments; and
- Private pensions under the Employee Retirement Income Security Act (ERISA) (29 U.S.C.A., Section 1056(d)).

d. Assignment of income

A legally assignable payment (see SI 01120.200G.1.c. for what is **not** assignable), that is assigned to a trust/trustee, is income for SSI purposes **unless** the assignment is irrevocable. For example, child support or alimony payments paid directly to a trust/trustee as a result of a court order, are not income. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

2. Trust principal is a resource

a. Trust earnings

Trust earnings are income to the individual for whom trust principal is a resource, unless the terms of the trust make the earnings the property of another. (See SI 00810.030 for when income is counted.)

b. Additions to principal

Additions to principal may be income or conversion of a resource, depending on the source of the funds. If funds from a third party are deposited into the trust, the funds are income to the individual. If funds are transferred from an account owned by the individual to the trust, the funds are not income, but conversion of a resource from one account to another.

H. Policy - Medicaid trusts and Medicaid qualifying trusts

1. Medicaid Trusts

a. General

Medicaid trusts are trusts established by an individual on or after 8/11/93, that are made up, in whole or in part, of assets (income and/or resources) of that individual. These trusts are created by a means other than a will. A trust is considered established by an individual if it was established by:

- the individual;
- the individual's spouse; or
- a person, including a court or administrative body, with legal authority to act for the individual or spouse or who acts at the direction or request of the individual or spouse.

Medicaid trusts may contain terms such as "OBRA 1993 pay-back trust," "trust established in accordance with 42 USC 1396" or may be mislabeled as an "MQT." The Medicaid trust law affects the individual's eligibility for **Medicaid-only,** and has no effect on the SSI income and resource determination.

See SI 01730.048 for additional information and procedures for coding and referring these trusts to the State Medicaid agencies.

b. State reimbursement provisions

Medicaid trusts generally have a payback provision stating that upon termination of the trust, or the death of the beneficiary, the State Medicaid agency will be reimbursed for medical assistance paid on behalf of the individual. According to the law in most States, the State is not considered a residual or contingent beneficiary, but is a creditor, and the reimbursement is payment of a debt, unless the trust instrument reflects a clear intent that the State be considered a beneficiary, rather than a mere creditor. This law may or may not apply in your State, so consult your regional instructions or regional office.

2. Medicaid Qualifying Trusts (MQT)

An MQT is a trust or similar legal device established prior to 10/1/93, other than by a will, under which the grantor (or spouse) may be the beneficiary of all or part of the payments from the trust. The amount from the MQT considered available as a resource to the individual for Medicaid purposes is the maximum amount of payments that may be distributed under the terms of the trust to the individual by the trustee. This **Medicaid-only** provision has no effect on the income and resource determination for SSI purposes.

NOTE: An MQT must have been established prior to 10/1/93, when section 1902(k) of the Social Security Act was repealed.

I. Policy - representative payees and trusts

If a trust was established by a representative payee with an underpayment or conserved funds, see GN 00602.075 for additional rules that may apply.

J. Procedure - development and documentation of trusts

1. Written trust

a. Review the trust document

Obtain a copy of the trust document and related documents and, if possible, review it to determine whether the:

- individual (claimant, recipient or deemor) is grantor, trustee, or beneficiary;
- trust is revocable or can be terminated and, if so, whether the individual has authority to revoke or terminate the trust and to use the principal for his or her own support and maintenance;
- individual has unrestricted access to the trust principal;
- trust provides for payments to the individual or on his or her behalf;
- trust principal generates income (earnings) and, if so, whether the individual has the right to any of that income;
- trust contains a spendthrift clause that prohibits the voluntary and involuntary alienation of any trust payments; and
- trust is receiving payments from another source.

b. Consult regional instructions

Consult any regional instructions which pertain to trusts to see if there are State laws governing revocability or irrevocability; State laws governing grantor trusts or other State law issues to consider.

c. Referral to regional office

If there are any unresolved issues that prevent you from determining the resource status of the trust, or there are issues for which you believe you need a legal opinion, follow your regional instructions or consult with your RO program staff. Many issues can be resolved over the phone. If necessary, they will tell you to refer the document with any relevant information or statements to your Assistant Regional Commissioner, Management and Operations Support (ARC, MOS) for possible referral to the Regional Chief Counsel.

NOTE: When referring a trust to the RO, make sure to include all documentation and identify the applicant/recipient, source of funds/assets and relevant relationships of others named in the trust.

2. Oral trusts

a. State recognizes as binding

If the State in question recognizes oral trusts as binding (see regional instructions):

- record all relevant information;
- obtain from all parties signed statements describing the arrangement; and
- unless regional instructions specify otherwise, refer the case, through the ARC, MOS, to the Regional Chief Counsel.

b. State does not recognize as binding

If the State does not recognize oral trusts as binding (see regional instructions), see SI 01120.020 if an agency relationship (i.e., a person is acting as an agent of the individual) is involved.

3. Determining the nature and value of trust property (written or oral trust)

Apply the policies in SI 01120.200D and in any regional instructions to determine whether the trust is a resource.

NOTE: When you are unsure about any relevant issue, do not make a determination, but discuss the case with the RO programs staff. They will refer the case to the Regional Chief

Counsel, if necessary.

When trust principal is a resource and its value is material to eligibility, determine the nature of the principal and establish its value by:

- contacting the holder of the funds, if cash; or
- developing as required under the applicable POMS section for the specific type(s) of property, if the trust principal is not cash.

4. Documentation – trust evidence

Record all information used in determining whether the trust is a resource or creates income in the Trust page in MSSICS; see MSOM INTRANETSSI 013.005 for more information on what trust information to record. Record your conclusions on the DROC (and subsequently lock the DROC) or the EVID screen. When a certified electronic folder exists, fax the following into Section D. (Non-Disability Development) of the Electronic Disability Collect System (EDCS):

- a copy of the trust document;
- copies of any signed agreements between organizations making payments to the individual and the individual legally entitled to such payments, if the payments have been assigned to the trust/trustee;
- records of payments from the trust, as necessary; and
- any other pertinent documents.

In the case of a paper folder, fax these materials into the Non-Disability Repository for Evidentiary Documents (NDRed), or record any development electronically in EVID.

5. Medicaid Trust and Medicaid qualifying trust determination

Consult SI 01730.048 regarding Medicaid trusts and MQTS and the procedure to follow.

6. Systems input -- trusts

Make the appropriate entries to the MSSICS Trust (RTRS) page. For more information on the MSSICS Trust page, see MSOM INTRANETSSI 013.005. You may also make a CG field entry (RE06 or RE07) per SM 01301.820. On non-MSSICS cases or where otherwise warranted, use Remarks (see MSSICS 023.003).

7. Post-eligibility change in resource status

If a trust was previously determined not to be a resource, but because of policy clarifications you now determine that it is a resource (or vice versa), reopen the prior determination subject to the rules of administrative finality. (See the overpayment waiver rules in SI 02260.001.)

K. Procedure - Discussing SSI trust policy with the public

1. What to discuss

When you discuss SSI trust policy with a member of the public, consider the following points in your discussion, as applicable:

a. Do not advise a claimant, recipient, representative payee, or legal guardian on how to invest funds or hold property in trust. Remember that you cannot provide the kind of financial guidance that attorneys, accountants, and financial advisors are usually able to provide. Do not attempt to provide legal advice.

   Never recommend to an individual that he or she set up a trust or suggest that you think a trust would be beneficial to him or her. Be aware that by not knowing all of the legal implications of such an action, you could endanger their eligibility for other programs or benefits (e.g., Medicaid).

   Be aware that a trust allowing eligibility for SSI does not mean that the trust will allow eligibility for Medicaid. Suggest that the individual check with the State Medicaid office.

b. Explain how trusts affect SSI eligibility and payment amount, in general terms or in terms specific to a particular trust arrangement. In the latter case, examine the trust document or a draft of the proposed trust provisions, as necessary. Do not, however, advocate specific changes to a trust.

c. Remember that an individual's ability to access and use the trust principal depends on the terms of the trust document and on State law. Since State laws in this area may be complex, discuss the individual's documents with your regional office if you are unable to make a determination.

2. Use "SSI Spotlight" on trusts

Consider giving the individual a copy of the "SSI Spotlight" on trusts. A copy of the Spotlight is available on the Internet at: http://www.socialsecurity.gov/ssi/spotlights/spot-trusts.htm.

L. Examples of trusts

The following examples are illustrative of situations that you may encounter. You should not

rely solely on the analysis given in the examples in making determinations in a specific case as laws vary from State to State and the language of individual trust documents may provide different results from those given in the example. You can refer to regional instructions, if any, and consult your regional office, as necessary. Also you should be aware of the implications the trust may have for Medicaid eligibility. SI 01730.048 contains instructions on trusts and Medicaid.

1. Trust principal is a resource

a. Situation

The claimant is the beneficiary of a trust established on her behalf by her mother, who is her legal guardian. The money used to establish the trust was inherited by the claimant from her grandmother. The mother is also the trustee. The trust document clearly indicates that the trust may be revoked at any time by the grantor.

b. Analysis

Since the grantor may revoke the trust at any time, the trust is a resource to the grantor. In this situation, the child is the grantor (see SI 01120.200B.2.) and the trust is her resource. This is the case because the actions of the mother, as her legal guardian, are as an agent for the child.

2. Trust principal is not a resource

a. Example 1

- **Situation**

The SSI recipient is the beneficiary of an irrevocable trust created by her deceased parents. Her brother is the trustee. The terms of the trust give the brother full discretionary power to withdraw funds for his sister's educational expenses. The trustee uses these funds to pay the recipient's tuition and room and board at a boarding school. The trust document also specifies that $25 of monthly interest income be paid into a separate account that designates the recipient as owner. She has the right to use these funds in any way she wishes. The trust also contains a valid spendthrift clause that prohibits the beneficiary from transferring her interest in the trust payments prior to receipt.

- **Analysis**

Since the recipient, as beneficiary, has no authority to terminate the trust established with her

parents' assets or access the principal directly, the trust principal is not her resource. While trust disbursements on a beneficiary's behalf may be income, the disbursements for tuition are not income since they do not provide food or shelter in any form. However, the trust disbursements for room and board are in-kind support and maintenance valued under the PMV rule. The $25 deposits of trust earnings into the recipient's personal account are income when the deposit is made and are resources to the extent retained into the following month. The beneficiary's right to the stream of $25 monthly payments is not a resource because she cannot sell or assign them prior to receiving them because of the valid spendthrift clause. (See SI 01120.200B.16. for a definition of spendthrift clauses.)

b. Example 2

- **Situation**

The claimant is a minor and the beneficiary of an irrevocable trust established with the child's annuity payment by his father, who is his representative payee. The father is also the trustee. The claimant's brothers and sisters will become the trust beneficiaries in the event of the claimant's death. In the State where the claimant lives, the grantor can revoke the trust if he is also the sole beneficiary. The brothers and sisters are "residual beneficiaries" who become the beneficiaries upon the prior beneficiary's death or occurrence of another event.

- **Analysis**

The trust principal is not a resource to the claimant. Under the general rule in SI 01120.200D.2., the trust document provides that the trust is irrevocable. Although the claimant can be considered the grantor of the trust (because the actions of the father as payee are as an agent of the claimant), the trust is not revocable under the rule for grantor trusts in SI 01120.200D.3. because the claimant is not the sole beneficiary.

3. Principal held in a grantor trust is a resource

a. Situation

The trust beneficiary, a 17-year-old SSI recipient, received a $125,000 judgment as the result of a car accident that left him disabled. His mother, as his legal guardian, placed the money in an irrevocable trust for the sole benefit of the recipient with the recipient's sister as trustee. The trustee has absolute discretion as to how the trust funds are to be spent and the trust has a prohibition against the trustee spending an amount of funds that would make the recipient ineligible for Federal or State assistance payments. Applicable State law recognizes the principle that if an individual is both the grantor of a trust and the sole beneficiary, the trust is revocable, regardless of language in the trust to the contrary.

b. Analysis

Since the recipient's mother, as his legal guardian, established the trust with funds that belonged to the recipient, it is treated as if the recipient established the trust himself. Therefore, he is considered the grantor of the trust. Since he is also the sole beneficiary of the trust, the trust is revocable and is the recipient's resource, regardless of the language in the trust document. The recipient is ineligible due to excess resources.

4. Trust requires legal review

a. Example 1

- **Situation**

The SSI claimant is the beneficiary of a revocable trust established with her father's assets for her future care. Her father is her legal guardian. The claimant, as trust beneficiary, has no authority to terminate the trust. The CR reviews the trust document to see if the claimant, through her legal guardian, has unrestricted access to the trust principal, whether the trust provides for payments on her behalf or whether the trust principal generates income.
The trust document is very complex and the situation is further complicated by the fact that the claimant's father is grantor, trustee, and her legal guardian. The CR cannot determine whether the trust principal is available to the trust beneficiary through the grantor/trustee.

- **Analysis**

Because it is not clear from the trust document whether the father, as legal guardian, "stands in the claimant's shoes" and controls the trust, the CR consults with the RO staff for possible referral through the ARC, MOS, to the Regional Chief Counsel for an opinion.

b. Example 2

- **Situation**

The recipient is the beneficiary of an irrevocable trust. The trust document indicates that the recipient is the sole named beneficiary and also the grantor of the trust. The document also indicates that there are unnamed residual beneficiaries, the recipient's "heirs."

- **Analysis**

The adjudicator consults regional instructions on State law pertaining to grantor trusts. According to those instructions, a grantor trust may be a resource to the recipient, but the State law is unclear about the effect of the unnamed residual beneficiaries. The adjudicator consults with the RO staff for possible referral through the ARC, MOS, to the Regional Chief

Counsel.

M. References

- Trusts Established with the Assets of an Individual on or After 1/1/00 – SI 01120.201-SI 01120.204
- Conservatorship Accounts – SI 01140.215
- Agency Relationships – SI 01120.020, SI 00810.120
- Checking and Savings Accounts – SI 01140.200
- Medicaid Qualifying Trusts – SI 01730.048
- When to Charge ISM from Third-Party Vendor Payments – SI 00835.360
- Transfer of Resources for Less Than Fair Market Value – SI 01150.100
- Excluded Resources – SI 01110.210
- MSOM INTRANETSSI 013.005 Trust

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SI 01120.201 Trusts established with the assets of an individual on or after 1/1/00

Citations: Social Security Act as amended in 1999, Section 1613(e); 42 U.S.C. 1382b; P.L. 106-169, Section 205

Topic	Reference
Background – Trusts	SI 01120.201A
Definitions – Trusts	SI 01120.201B
Policy--General	SI 01120.201C
Policy--Treatment Of Trusts	SI 01120.201D
Policy—Relationship To Transfer Penalty (Irrevocable Trust)	SI 01120.201E
Policy—For The Benefit Of/On Behalf Of/For The Sole Benefit Of An Individual	SI 01120.201F
Policy—Legal Instrument Or Device Similar To A Trust	SI 01120.201G
Policy--Burial Trusts	SI 01120.201H
Policy--Disbursements From Trusts	SI 01120.201I
Policy--Earnings/Additions To Trusts	SI 01120.201J

References	SI 01120.201K

A. Background

1. Legislative enactment

On 12/14/99, the President signed into law the Foster Care Independence Act of 1999 (P.L. 106-169). Section 205 of this law provides, generally, that trusts established with the assets of an individual (or spouse) will be considered a resource for Supplemental Security Income (SSI) eligibility purposes. It also addresses when earnings or additions to trusts will be considered income. The legislation also provides **exceptions to the statutory rules in Section 1613(e) of the Act** for counting trusts as resources and income (see SI 01120.203). These provisions are effective for trusts established on or after 1/1/00.

For trusts established prior to 1/1/00, trusts established with the assets of third parties, and trusts that meet an exception to the statutory provisions of Section 1613(e), but meet the definition of a resource in SI 01110.100B.1., see SI 01120.200.

2. Case processing alert

Trusts are often complex legal arrangements involving State law and legal principles that a claims representative may not be able to apply without legal counsel. Therefore, the following instructions may only be sufficient for you to recognize that an issue is present that should be referred to your regional office (RO) for possible referral to the Regional Chief Counsel. When in doubt, discuss the issue with the RO staff. Many issues can be resolved by phone.

B. Definitions of trusts

1. Corpus or principal

The **corpus or principal** of the trust is all property and other interests held by the trust, including accumulated earnings and any other additions, such as new deposits, to the trust after its establishment. However, do not consider earnings or additions to be included in the corpus in the month they are credited or otherwise transferred to the trust.

NOTE: Earnings or additions are not included in the corpus in the month that they are credited or transferred into the trust because they are considered under income counting rules in that month (see SI 00810.000).

2. Asset

For purposes of this section, an **asset** is **any income or resource** of the individual or the individual's spouse including:

- income excluded under section 1612(b) of the Social Security Act (the Act) (For income exclusions in the Act, see SI 00830.099 and SI 00820.500);
- resources excluded under section 1613 of the Act (For resource exclusions that are found in the Act, see SI 01130.050);
- any other payment or property to which the individual or individual's spouse is entitled, but does not receive or have access to because of action by:
    a. the individual or individual's spouse;
    b. a person or entity (including a court) with legal authority to act in place of, or on behalf of, the individual or spouse; or
    c. a person or entity (including a court) acting at the direction of, or on the request of, the individual or spouse.

3. Trust income

For purposes of this section, **trust income** includes any earnings of, and additions to, a trust established by an individual:

- of which the individual is a beneficiary;
- to which the new trust provisions apply; and
- in the case of an irrevocable trust, if any circumstances exist under which payment from the earnings or additions could be made to or for the benefit of the individual.

4. Spouse

For the purposes of this section, the individual's **spouse** is the individual we consider to be the spouse for normal SSI purposes (see SI 00501.150B).

5. Legal instrument or device similar to a trust

This is a legal instrument, device, or arrangement, which may not be called a trust under State law, but is similar to a trust. That is, it involves:

- a grantor (see SI 01120.200B.2.) or individual who provides the assets to fund the legal

instrument, device, or arrangement (see SI 01120.201B.7. in this section).

- who transfers property (or whose property is transferred by another).
- to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section).

The grantor makes the transfer with the intention that it be held, managed or administered by the individual or entity for the benefit of the grantor or others. A legal instrument or device similar to a trust can include (but, is not limited to) escrow accounts, investment accounts, conservatorship accounts (SI 01140.215), pension funds, annuities, certain Uniform Transfers to Minors Act (UTMA) accounts and other similar devices managed by an individual or entity with fiduciary obligations.

6. Trust established by a will

A trust established by a will or a **testamentary trust** (see SI 01120.200B.15.) is a trust established under the terms of a will and which is only effective upon the individual's death. A trust to which property is transferred during the life of the individual who created the will is not a trust established by a will, even if the will transfers additional property to that trust. Field offices should obtain and review a copy of the last will and testament.

7. Trust established with the assets of an individual

A trust is considered to have been established with the assets of an individual if any assets of the individual (or spouse), regardless of how little, were transferred to a trust other than by a will.

NOTE: The grantor (see SI 01120.200B.2) named in the trust document who provided the assets funding the trust and the individual whose actions established the trust may not be the same. The trust may name the individual (e.g.. a parent or legal guardian) who physically took action to establish the trust rather than the individual who provided the trust assets. This distinction is important, especially in developing Medicaid trust exceptions in SI 01120.203.

8. Foreclosure

For purposes of this section, **foreclosure** is an event that bars or prevents access to, or payment from, a trust to an individual now or in the future.

9. Other definitions

For other definitions applicable to this section, see SI 01120.200B.

C. Policy for certain trusts established on or after 1/1/2000

1. Effective date

- The trust provisions of P.L. 106-169 apply to certain trusts **established on or after 1/1/00.**
- The trust provisions of P.L. 106-169 do not apply to trusts established with the assets of an individual prior to 1/1/00, regardless of the individual's filing date. Trusts established prior to 1/1/00 are treated under instructions in SI 01120.200.
- A trust established with the assets of an individual (see SI 01120.201B.7. in this section) prior to 1/1/00, but added to or augmented on or after 1/1/00, is still considered to be established prior to 1/1/00. (However, additions to such a trust may be considered a transfer of resources, see SI 01150.100)

EXAMPLE 1 : Emily Lombardozi, age 67, has a settlement agreement as a result of an automobile accident in 1994, in which she was paralyzed. Under the agreement, she receives a lump-sum payment in March of each year. Since 1995, the payments have been paid into an irrevocable trust. The payments received in 3/00 and following are not considered to be establishment of a trust for purposes of these provisions. They are additions to a trust established prior to 1/1/00 and are evaluated under SI 01120.200.

EXAMPLE 2: Same situation as EXAMPLE 1 except that Ms. Lombardozi receives an inheritance of $3,000 that she deposits into the trust. The trust is evaluated under the rules in SI 01120.200, but the deposit of the inheritance is evaluated as a transfer of resources under SI 01150.100.

The transfer of an individual's property to an existing trust is considered to be the establishment of a trust subject to the provisions of this section if:

- the transfer occurs on or after 1/1/00; and
- the corpus of the trust does not contain property transferred from the individual prior to 1/1/00.

EXAMPLE: Robert Gates is a disabled child. His grandmother established an irrevocable $2,000 trust, of which he is the beneficiary, in 12/97. Robert won a lawsuit in 2/00, and the money from the judgment ($50,000) was placed in the trust his grandmother established. Since Robert transferred all of the money in the trust after 1/1/00, deposit of the judgment funds ($50,000) is considered establishment of a trust on or after 1/1/00, for purposes of these provisions. However, the funds deposited by his grandmother are not subject to these provisions since they are funds of a third party and are subject to evaluation under SI

01120.200.

These provisions do not apply to trusts established **solely** with the assets of a third party, either before or after 1/1/00. (For development, see SI 01120.200.) However, if at any point in the future the individual's assets are added to such a trust, the trust then becomes subject to development under SI 01120.201 through SI 01120.204.

2. Applicability

a. Trusts to which this provision applies

Except as provided in SI 01120.203A, this section applies to trusts "established with the assets of an individual." A trust is considered to have been established with the assets of an individual if any assets of the individual (or spouse) (regardless of how little) were transferred to a trust other than by a will. (For a definition of an asset, see SI 01120.201B.2. in this section).

b. Examples of trusts

- An individual who was the plaintiff in a medical malpractice lawsuit is the beneficiary of a trust. The trust states that the defendant doctor's insurance company established it so the settlement funds were never paid to the plaintiff directly. However, for SSI eligibility purposes, the trust was **established with the assets of the individual** because the trust contains assets of the individual (see SI 01120.201B.2. in this section), which he or she did not receive because of action on behalf of, in the place of, at the direction of, or on the request of, the individual.
- Likewise, the same result would occur if a court had ordered the settlement to be placed in a trust, even if the individual was a child and whether State law did or did not require the settlement to be placed in a trust for the child.
- A disabled SSI recipient over age 18 receives child support which is assigned by court order directly into the trust. Since the child support is the SSI recipient's income, the recipient is the grantor of the trust and the trust is a resource, unless it meets an exception in SI 01120.203. If the trust meets an exception and is not a resource, the child support is income, unless it is irrevocably assigned to the trust or trustee, per SI 01120.201J.1.d. in this section. In this example, the court ordered the child support to be paid directly into the trust, so we consider it to be irrevocably assigned to the trust/trustee.

c. Individual's assets form only a part of the trust

In the case of an irrevocable trust where the assets of the individual (or the individual's spouse) were transferred along with the assets of another individual(s), these provisions apply to the portion of the trust attributable to the assets of the individual (or spouse). Thus, in determining countable resources in the trust, you must prorate any amounts of resources, based on the proportion of the individual's assets in the trust.

EXAMPLE: Jimmy Smith is an adult with cerebral palsy. His grandparents left $75,000 in trust for him in their wills. Recently (after 1/1/00), Mr. Smith won an employment discrimination lawsuit and was awarded a $1,500 judgment which was deposited into the trust his grandparents established. The $1,500 of Mr. Smith's funds are subject to these provisions and could be a resource if payment could be made to or for Mr. Smith's benefit (see SI 01120.201D.2. in this section). The $75,000 deposited by his grandparents is not subject to these provisions (see SI 01120.200).

d. Application of the trust provisions

These provisions apply to trusts without regard to:

- the purpose for which the trust was established;
- whether the trustees have or exercise any discretion under the trust;
- any restrictions on when or whether distributions may be made from the trust; or
- any restrictions on the use of distributions from the trust.

This means that any trust established with the assets of an individual on or after 1/1/00 will be subject to these provisions and may be counted in determining SSI eligibility. No clause or requirement in the trust, no matter how specifically it applies to SSI or other Federal or State program (i.e., **exculpatory clause**), precludes a trust from being considered under the rules in this section. An exculpatory clause is one that attempts to exempt the trust from the applicability of these rules. For example, an exculpatory clause would be one that states, "Section 1613(e) of the Social Security Act does not apply to this trust." Such a statement has no effect as to whether these rules apply to the trust.

NOTE: While exculpatory clauses, use clauses, trustee discretion and restrictions on distributions, etc., do not affect a trust's countability, they do have an impact on how the various components are treated. For example, a prohibition in a discretionary irrevocable trust that limits the trustee to distributing no more than $10,000 to an individual has no effect on whether or not the trust is countable, but does affect the amount that is countable.

3. Income

For purposes of the SSI program, income includes any earnings or additions to a trust

established with the assets of an individual; of which the individual is a beneficiary; and

- which is a resource under these trust provisions; and
- in the case of an irrevocable trust, if any circumstances exist under which payment from the earnings or additions could be made to or for the benefit of the individual.

(For additional income instructions, see SI 01120.201J in this section).

D. Policy on the treatment of trusts

1. Revocable trusts

a. General rule for revocable trusts

In the case of a revocable trust established with the assets of the individual, the entire corpus of the trust is a resource to the individual. However, certain exceptions may apply. (See SI 01120.203A).

NOTE: The exceptions in SI 01120.203A only apply to counting a trust under the statutory provisions of section 1613(e) of the Act. A trust that meets the definition of a resource is still countable and must be developed under SI 01120.200.

b. Relationship to transfer penalty

Any disbursements from a trust that is a resource that are not made to, or for the benefit of, the individual (SI 01120.201F.1. in this section) are considered a transfer of resources. (For transfer of resource provisions, see SI 01150.100).

c. Example

Willie Jones is a young adult with mental retardation. Mr. Jones had a revocable trust established after 1/1/00. All but $5,000 of funds in the trust had been spent on Mr. Jones' behalf. His mother files for SSI for him and is told that he is not eligible because of the money in the trust. His mother takes $4,500 of the money and makes a down payment on a new car that she says she will use to transport Mr. Jones. However, she registers the car in her own name. Even though his mother will use the car to transport Mr. Jones, the purchase of the car is a transfer of resources since the car does not belong to him. (For policy on purchases for the benefit of the individual and titling of property, See SI 01120.201F.1. in this section).

2. Irrevocable trusts

a. General rule for irrevocable trusts

In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how payments from the trust can be made. If payments from the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F.1. in this section), the portion of the trust from which payment could be made that is attributable to the individual is a resource. However, certain exceptions may apply (see SI 01120.203).

b. Circumstance under which payment can or cannot be made

In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. However, if a payment can be made to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies (i.e., the portion of the trust that is attributable to the individual is a resource, provided no exception from SI 01120.203 applies).

c. Examples

- An irrevocable trust provides that the trustee can disburse $2,000 to, or for the benefit of, the individual out of a $20,000 trust. Only $2,000 is considered to be a resource under SI 01120.201D.2.a. in this section. The other $18,000 is considered to be an amount which cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources rule in SI 01120.201E in this section and SI 01150.100.
- If a trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.
- An individual establishes an irrevocable trust with $10,000 of his assets. His parents contribute another $10,000 to the trust. The trust only permits distributions to, or for the benefit of, the individual from the portion of the trust contributed by his parents. The trust is not subject to the rules of this section. The portion of the trust contributed by the individual is subject to evaluation under the transfer of resources rules in SI 01150.100 (see also SI 01120.201E in this section). The portion of the trust contributed by his parents is subject to evaluation under SI 01120.200.

3. Types of payments from the trust

a. Payments to an individual

Payments are considered to be made **to the individual** when any amount from the trust, including amounts from the corpus or income produced by the trust, are paid directly to the individual or someone acting on his or her behalf, e.g., guardian or legal representative.

b. Payments on behalf of or for the benefit of an individual

See SI 01120.201F.1. in this section. Also, for more instructions on disbursements from trusts, see SI 01120.201I in this section.

4. Placing excluded resources in a trust

If an individual places an excluded resource in a trust and the trust is a countable resource, the resource exclusion can still be applied to that resource. For example, if an individual transfers ownership of his or her excluded home to a trust and the trust is a countable resource, the home is still subject to exclusion under SI 01130.100. (For a discussion of ownership of a home by a trust and the effect of payment of home expenses by the trust, see SI 01120.200F).

5. Trust rules versus transfer rules for assets in a trust

When an individual transfers assets to a trust, he or she generally transfers ownership of the asset to the trustee. In some cases, this could be considered a transfer of resources. In order to avoid both counting a trust as a resource and imposing a transfer of resources penalty for the same transaction**, the trust provisions take precedence over the transfer provisions**. If there are portions of the trust that cannot be counted as a resource, then the transfer rules may apply to that portion of the trust.

E. Policy for relationship to transfer penalty (irrevocable trust)

1. Trust established with individual's resources

a. Foreclosure of payment

When all or a portion of the corpus of a trust, established with the assets of an individual (or spouse) with the individual's (or spouse's) resources, cannot be paid to, or for the benefit of, the individual, the portion which cannot be paid is considered a transfer of resources for less

than fair market value.

The date of the transfer is considered to be:

- the date the trust was established; or
- if later, the date on which payment to the individual was foreclosed (i.e., an action was taken which precludes future payments from the trust).

In determining the value of the transfer, do not subtract the value of any disbursements made after the date determined above. Additions to the foreclosed portion of the trust after the above date may be new transfers that must be developed separately.

(For instructions related to transfers of resources, see SI 01150.100).

b. Payment to or for the benefit of another

When all or a portion of a trust, established with the individual's or spouse's resources, is a resource to the individual, if payment is made from the portion of the trust that is a resource to the individual to, or for the benefit of, another, then such a payment is a transfer of resources.

c. Examples

- **EXAMPLE 1:**

Millie Russell is an adult SSI recipient. Upon the death of her mother, Ms. Russell receives the proceeds of a life insurance policy in the amount of $30,000. She uses the proceeds to establish an irrevocable trust solely to pay for the college expenses of her younger sister, in accordance with her mother's wishes. Receipt of the insurance proceeds is income to Ms. Russell. Establishment of the trust is a transfer of resources by Ms. Russell since payment to or for her own behalf is foreclosed by terms of the trust. Even though establishing the trust was her mother's wish, she was not legally obligated to do so. Her mother could have established a trust in her will or named the younger sister as beneficiary of the insurance policy.

- **EXAMPLE 2:**

Same scenario as in EXAMPLE 1, except that Ms. Russell establishes an irrevocable trust for the benefit of her sister and herself. The trust is a resource to Ms. Russell and makes her ineligible. The trust makes a $5,000 payment to State College on behalf of her sister for tuition. The $5,000 payment is a transfer of resources for Ms. Russell. Although counting the trust as a resource would make her ineligible, if the trust principal was spent down to the point where it would allow resource eligibility, we still have to consider the tuition payments

or other payments to or on behalf of her sister made within the 36-month transfer look-back period. (For more information on the transfer penalty, see SI 01150.100).

2. Trust established with individual's non-resource assets

a. What is a non-resource asset?

A **non-resource asset** is an asset that meets the definition in SI 01120.201B.2. in this section, but that does not meet the definition of a resource (SI 01110.100B.1. and SI 01110.115).

b. Transfer penalty

When all or a portion of the corpus of a trust established by an individual or spouse with the individual's or spouse's non-resource assets is considered to be a resource under the trust provisions of P.L. 106-169, the transfer of resources penalty may apply in the following circumstances:

- If an event occurs which forecloses (see SI 01120.201B.8.) payment from the portion of the trust that is a resource, then such foreclosure is a transfer of resources as of the date that payment was foreclosed.
- If payment is made from the portion of the trust that is a resource to or for the benefit of another individual, then such payment is a transfer of resources.

In determining the value of the transfer, do not subtract the value of any disbursements made after the date of foreclosure. Additions, by the individual, to the foreclosed portion of the trust after the foreclosure date may be new transfers that must be developed separately. (For instructions related to transfers of resources, See SI 01150.100).

NOTE: If a trust established with the individual's non-resource assets is not a resource to the individual, payments to or for the benefit of another person or foreclosure of payment to the individual is not subject to the transfer of resources penalty because the trust was not a resource. For example, an individual has non-resource assets of $10,000 that she places into an irrevocable trust for the benefit of her daughter. The trust is not a resource to the individual because nothing can be paid to or for her benefit. It is also not a transfer of resources subject to the penalty provision since the trust is not a resource and the trust was established with non-resource assets. Likewise, payments from the trust to or for the benefit of the daughter are not transfers of resources.

F. Policy for the benefit of or on behalf of or for the sole benefit of an individual

1. Trust established for the benefit of or on behalf of an individual

Consider a trust established **for the benefit** of an individual if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

Likewise, consider payments to be made **on behalf of,** or **to or for the benefit of** an individual, if payments of any sort from the corpus or income of the trust are paid to another person or entity so that the individual derives some benefit from the payment.

For example, such payments could include purchase of food or shelter, or household goods and personal items that count as income. The payments could also include services for medical or personal attendant care that the individual may need which does not count as income.

NOTE: These payments are evaluated under regular income-counting rules. However, they do not have to meet the definition of income for SSI purposes to be considered to be made **on behalf of,** or **to or for the benefit of** the individual.

If funds from a trust that is a resource are used to purchase durable items, e.g., a car or a house, **the individual (or the trust) must be shown as the owner of the item** in the percentage that the funds represent the value of the item. When there is a deed or titling document, the individual (or trust) must be listed as an owner. Failure to do so may constitute evidence of a transfer of resources.

2. Trust established for the sole benefit of an individual

a. General rule regarding sole benefit of an individual

Consider a trust established **for the sole benefit of** an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life.

Except as provided in SI 01120.201F.2.b. in this section and SI 01120.201F.2.c. in this section, do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual.

b. Exceptions to the sole benefit rule for third party payments

Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:

- Payments to a third party that result in the receipt of goods or services by the trust

beneficiary;

- Payment of third party travel expenses which are necessary in order for the trust beneficiary to obtain medical treatment; and
- Payment of third party travel expenses to visit a trust beneficiary who resides in an institution, nursing home, or other long-term care facility (e.g., group homes and assisted living facilities) or other supported living arrangement in which a non-family member or entity is being paid to provide or oversee the individual's living arrangement. The travel must be for the purpose of ensuring the safety and/or medical well-being of the individual.

NOTE: If you have questions about whether a disbursement is permissible, please request assistance from your regional office.

c. Exceptions to the sole benefit rule for administrative expenses

The trust may also provide for reasonable compensation for a trustee(s) to manage the trust, as well as reasonable costs associated with investment, legal or other services rendered on behalf of the individual with regard to the trust. In defining what is reasonable compensation, consider the time and effort involved in providing the services involved, as well as the prevailing rate of compensation for similar services considering the size and complexity of the trust.

NOTE: You should not routinely question the reasonableness of a trustee's compensation. However, you should consider the factors above to determine if there is a reason to question the reasonableness of the fees or compensation.

d. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

If a trust previously determined to be exempt from resource counting under section 1917(d)(4)(A) or (C) contains a third party travel expense provision(s) that must be amended in order to conform with the third party travel expense provisions in SI 01120.201F.2.b., it must be amended within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains a third party travel expense provision(s) that must be amended in order to continue qualifying for the exception under Section 1917(d)(4)(A) or Section 1917(d)(4)(C).

Do not count a previously exempted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of this section after the expiration of the 90-day amendment period, begin counting the trust as a resource under normal resource counting rules.

NOTE: Each previously excepted trust is permitted only one 90-day amendment period to conform with the third party travel expense provisions in SI 01120.201F.2.b. in this section.

G. Policy for a legal instrument or device similar to a trust

1. What is a legal instrument or device?

Consider under trust rules a legal instrument, device, or arrangement, which may not be called a trust under State law, but which is similar to a trust. We will consider such an instrument, device or arrangement as a trust if:

- it involves a grantor (see SI 01120.200B.2.) who transfers property (or whose property is transferred by another);
- the property is transferred to an individual or entity with fiduciary obligations (considered a trustee for purposes of this section); and
- the grantor transfers the assets to be held, managed or administered by the individual or entity for the benefit of the grantor or others.

However, we will not consider these arrangements under trust rules if they would be counted as resources under regular SSI resource-counting rules.

2. Examples of a legal instrument or device

A legal instrument or device similar to a trust can include (but, is not limited to):

- escrow accounts;
- investment accounts;
- conservatorship accounts (SI 01140.215);
- pension funds (SI 01120.210);
- annuities;
- certain Uniform Transfers to Minors Act (UTMA) accounts; and
- other similar devices managed by an individual or entity with fiduciary obligations.

H. Policy for burial trusts

It is important to determine whether a burial trust was established with the individual's funds or funds that have been irrevocably paid to the funeral director. Since the trust provisions of P.L. 106-169 apply without regard to the purpose for which the trust was established, burial

trusts that may be irrevocable under State law may be countable resources for SSI resource-counting purposes if established with the individual's assets.

1. Burial trusts to which these provisions do not apply

a. Irrevocable burial contract

These provisions do not apply to a burial trust where:

- an individual irrevocably contracts with a provider of funeral goods and services for a funeral; and
- the individual funds the contract by prepaying for the goods and services; and
- the funeral provider subsequently places the funds in a trust; or
- the individual establishes an irrevocable trust, naming the funeral provider as the beneficiary.

b. Revocable burial contract

These provisions do not apply to a burial trust where:

- an individual revocably contracts with a provider of funeral goods and services; and
- the individual subsequently funds the contract by irrevocably assigning ownership of a life insurance policy to the provider; and
- State law does not prohibit the individual from irrevocably assigning ownership of a life insurance policy to the funeral provider; and
- the funeral provider subsequently places the life insurance policy in an irrevocable trust.

These transactions constitute a purchase of goods and services by the individual and establishment of a trust with the funeral provider's funds, not the funds of the individual. These arrangements should be evaluated under regular resource rules. Specifically, see the burial contract instructions in SI 01130.420 through SI 01130.425. However, if the individual who purchased the funeral was named as the beneficiary of the burial trust that a funeral director established, and thus retains an equitable interest, see the rules applicable to third-party trusts in SI 01120.200.

2. Burial trusts to which these provisions apply

The provisions of this section apply to a trust if:

- an individual does not enter into a pre-need funeral contract with a funeral provider, but establishes a burial trust with his or her own assets; or
- an individual enters into an irrevocable funeral contract with a funeral provider, but establishes a revocable trust to fund the contract; or
- an individual enters into a revocable funeral contract with a funeral provider, even if the funeral provider places the money in a trust (except as provided in SI 01120.201H.1.b. in this section).

3. Applicable exclusions

If application of this provision results in the counting of a burial trust as a resource, the burial space and burial funds exclusions may apply.

- Burial spaces may be excluded without limit for an individual, spouse and members of the individual's immediate family. (For a definition of burial spaces and applicable policy, see SI 01130.400).
- Burial funds may be excluded up to $1,500 each for an individual and spouse. (For applicable instructions, see SI 01130.409 through SI 01130.425).

The undue hardship waiver may also apply (see SI 01120.203C).

I. Policy for disbursements from trusts

1. Trust principal is not a resource

If the trust principal (or a portion of the trust principal) is not a resource, disbursements from the trust (or that portion) may be income to the SSI recipient, depending on the nature of the disbursements. Regular rules apply to determine when income is available.

a. Disbursements which are income

Cash paid directly from the trust to the individual is unearned income.

Disbursements from the trust to third parties that result in the beneficiary receiving non-cash items (other than food or shelter), are in-kind income if the items would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550).

For example, if a trust buys a car for the beneficiary and the beneficiary's spouse already has a car which is excluded for SSI, the second car is income in the month of receipt since it would

not be an excluded resource in the following month.

b. Disbursements which result in receipt of in-kind support and maintenance

Food or shelter received as a result of disbursements from a trust by the trustee to a third party is income in the form of in-kind support (ISM) and maintenance and is valued under the presumed maximum value (PMV) rule. (For instructions pertaining to the PMV rule, see SI 00835.300, and for rules pertaining to a home, see SI 01120.200F).

c. Disbursements which are not income

Disbursements from the trust that are not cash to the individual or are third party payments that do not result in the receipt of support and maintenance are not income. Such disbursements may take the form of educational expenses, therapy, medical services not covered by Medicaid, phone bills, recreation, entertainment, etc., (see SI 00815.400).

Disbursements made from the trust to a third party that result in the beneficiary receiving non-cash items (other than food or shelter) are not income if it would become a totally or partially excluded non-liquid resource if retained into the month after the month of receipt (see SI 00815.550).

For example, a trust purchases a computer for the beneficiary. Since the computer would be excluded from resources as household goods in the following month, the computer is not income (see SI 01130.430).

d. Disbursements for credit card bills

If a trust pays a credit card bill for the trust beneficiary, whether the individual receives income depends on what was on the bill. If the trust pays for food or shelter items on the bill, the individual will generally be charged with in-kind support and maintenance up to the PMV. If the bill includes non-food, non-shelter items, the individual usually does not receive income as the result of the payment unless the item received would not be a totally or partially excluded non-liquid resource the following month.

For example, if the credit card bill includes restaurant charges, payment of those charges results in ISM. If the bill also includes purchase of clothing, payment for the clothing is not income.

e. Disbursements for gift cards and gift certificates

Gift cards and gift certificates are considered cash equivalents. If a gift card or certificate can be used to buy food or shelter (e.g., restaurant, grocery store or VISA gift card), it is unearned income in the month of receipt. Any unspent balance on the gift card or certificate is a

resource beginning the month after the month of receipt. If the store does not sell food or shelter items (e.g., bookstore or electronics store), but the card does not have a legally enforceable prohibition on the individual selling the card for cash, then it is still unearned income (see SI 00830.522).

f. Reimbursements to a third party

Reimbursements made from the trust to a third party for funds expended on behalf of the trust beneficiary are not income. In addition, reimbursements from the trust to pay a credit card belonging to a third party for purchases made for the trust beneficiary are not income. Existing income and resource rules apply to items a trust beneficiary receives from a third party. If a trust beneficiary receives a non-cash item (other than food or shelter), it is in-kind income if the item would not be a partially or totally excluded non-liquid resource if retained into the month after the month of receipt. If a trust beneficiary receives food or shelter, it is income in the form of in-kind support and maintenance (ISM).

2. Trust principal is a resource

a. Disbursements to or for the benefit of the individual

If the trust principal (or a portion of the trust principal) is a resource to the individual, disbursements from the trust principal (or that portion of the principal) to or for the benefit of the individual are not income, but conversion of a resource. However, trust earnings, e.g., interest, are income. (For instructions pertaining to conversion of resources from one form to another, see SI 01110.100 and for treatment of earnings or additions when the trust principal is a resource, see SI 01120.201J.2. and SI 01120.201J.3. in this section).

b. Disbursements not to or for the benefit of the individual

In the case of a trust established with the assets of an individual (or his or her spouse), if from the trust, or portion of the trust, that is considered to be a resource:

- a disbursement is made other than to or for the benefit of the individual, such a disbursement is considered to be a transfer of resources (see SI 01150.100) as of the date of the payment; or
- no disbursement could be made to the individual under any circumstances, foreclosure of payment is considered to be a transfer of resources as of the date of the foreclosure.

(For a definition of "to or for the benefit of", see SI 01120.201F.1. in this section).

3. Mixed trust—part of trust is a resource and part is not a resource

In a situation where part of the trust was established with assets of the individual (or spouse) and part was established with the assets of other individuals, consult the trust document to determine from which portion of the trust disbursements were made. If the trust document does not specify, a statement from the trustee regarding the source of the disbursements will be determinative. If the trustee is unable to provide a statement, presume that disbursements were made first from the portion of the trust established with the funds of other individuals. When that portion is depleted, then presume that disbursements were made from the portion of the trust established with funds of the individual.

J. Policy for earnings and additions to trusts

1. Trust principal is not a resource

a. Trust earnings

Trust earnings are not income to the SSI claimant or recipient who is a trust beneficiary **unless** the trust directs, or the trustee makes, payment to the beneficiary.
Trust earnings are not income to the trustee or grantor **unless** designated as belonging to the trustee or grantor under the terms of the trust, e.g., as fees payable to the trustee or interest payable to the grantor.

b. Additions to principal

Additions to the trust principal made directly to the trust are not income to the grantor, trustee or beneficiary. Exceptions to this rule are listed in SI 01120.201J.1.c. and SI 01120.201J.1.d. in this section.

c. Exceptions

Certain payments are not assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. They may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. Important examples of non-assignable payments include:

- Temporary Assistance for Needy Families (TANF);
- Railroad Retirement Board-administered pensions;
- Veterans pensions and assistance;

- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security title II and SSI payments; and
- Private pensions under the Employee Retirement Income Security Act (ERISA)(29 U.S.C.A. section 1056(d)).

d. Assignment of income

A legally assignable payment (see SI 01120.201J.1.c. in this section for what is not assignable), that is assigned to a trust or trustee, is income for SSI purposes, **unless** the assignment is irrevocable. If the assignment is revocable, the payment is income to the individual legally entitled to receive it.

2. Trust principal is a resource--revocable trust

a. Trust earnings

Any earnings on a revocable trust are unearned income to the individual if:

- the trust was established with the assets of an individual;
- the individual is a beneficiary of the trust; and
- the trust is a resource under this section (For exclusion of interest income, see SI 00830.500).

b. Additions to principal--revocable trust

Any additions to a revocable trust are unearned income to the individual if:

- the trust was established with the assets of an individual,
- the individual is a beneficiary of the trust; and
- the trust is a resource under this section.

EXCEPTION: If the source of the additions is the individual's resources, the additions are not income but conversion of a resource.

3. Trust principal is a resource--irrevocable trust

a. Trust earnings

Any earnings on an irrevocable trust are unearned income to the individual in the percentage

that he or she provided the assets that constitute the corpus of the trust. This is the case if:

- the trust was established with the assets of an individual;
- the individual is a beneficiary of the trust;
- the trust is a resource under this section; and
- circumstances exist under which payment from the trust earnings could be made to or for the benefit of the individual.

For example, if the individual's assets constitute 75% of the trust corpus and the trust earns $100 interest in April, $75 of interest is income to the individual if the interest could be paid to or for the benefit of the individual (for exclusion of interest income, see SI 00830.500).

b. Additions to principal--irrevocable trust

Any additions to an irrevocable trust are unearned income to the individual if:

- the trust was established with the assets of an individual;
- the individual is a beneficiary of the trust;
- the trust is a resource under this section; and
- circumstances exist under which payment from the trust additions could be made to or for the benefit of the individual.

EXCEPTION: If the source of the additions to the trust is the individual's other resources, then the additions are not income, but a conversion of a resource.

4. Individual's assets form only a part of the trust

In the case of an irrevocable trust where the assets of the individual (or the individual's spouse) were transferred along with the assets of another individual(s), these provisions apply to the portion of the trust attributable to the assets of the individual (or spouse). Thus, in determining income to the trust, you must prorate any amounts of income, based on the proportion of the individual's assets in the trust.

EXAMPLE: Jimmy Smith is an adult with cerebral palsy. His grandparents left $75,000 in trust for him in their wills. Recently (after 1/1/00), Mr. Smith won an employment discrimination lawsuit and was awarded a $1,500 judgment, which was deposited into the trust that his grandparents established. The $1,500 of Mr. Smith's funds are subject to these provisions and could be a resource if payment could be made to or for Mr. Smith's benefit (see SI 01120.201D.2. in this section). The $75,000 deposited by his grandparents is not subject to these provisions (see SI 01120.200) and is not a resource.

In determining income to the trust (see SI 01120.201C.3.), we must prorate the income in proportion to the percentage of funds placed in the trust by Mr. Smith. Since this is an irrevocable trust, we will count 1.96% ($1,500/$76,500) of the trust earnings as income and not count 98.04% ($75,000/$76,500) of the earnings. Disbursements from, or additions to, the trust may require recalculation of the percentages.

K. References

- SI 01120.200 Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
- SI 01150.100 Transfer of Resources for Less Than Fair Market Value
- SI 01120.202 Development and Documentation of Trusts Established on or after 1/1/00
- SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00

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SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00

Topic	Reference
Introduction to Medicaid Trust Exceptions	SI 01120.203A
Policy—Exception To Counting Medicaid Trusts	SI 01120.203B
Policy—Waiver For Undue Hardship	SI 01120.203C
Procedure— Developing Exceptions To Resource Counting	SI 01120.203D
Procedure—Development Of Undue Hardship Waiver	SI 01120.203E
Procedure—Nonprofit Associations	SI 01120.203F
Procedure—Follow-Up To A Finding Of Undue Hardship	SI 01120.203G
Procedure—Reevaluating Revocable Trusts Processed Under The Policy In Effect From 1/1/2000 Through 1/31/2001	SI 01120.203H

A. Introduction to Medicaid trust exceptions

We refer to the exceptions discussed in this section as **Medicaid trust exceptions** because sections 1917(d)(4)(A) and (C) of the Social Security Act (the Act) (42 U.S.C. § 1396p(d)(4)(A) and (C)) set forth exceptions to the general rule of counting trusts as income and resources for the purposes of Medicaid eligibility and can be found in the Medicaid provisions of the

Act. While these exceptions are also Supplemental Security Income (SSI) exceptions, we refer to them as Medicaid trust exceptions to distinguish them from other exceptions to counting trusts provided in the SSI law (e.g., undue hardship) and because the term has become a term of common usage.

Development and evaluation of Medicaid trust exceptions are based on the type of trust under review. There are two types of Medicaid trusts to consider:

- Special Needs Trusts
- Pooled Trusts

B. Policy for exception to counting Medicaid trusts

1. Special needs trusts established under Section 1917(d)(4)(A) of the Act

a. General rules for special needs trusts

NOTE: Although this exception is commonly referred to as the **special needs** trust exception, the exception applies to any trust meeting the following requirements and does not have to be a strict **special needs** trust.

The resource counting provisions of Section 1613(e) do not apply to a trust:

- Which contains the assets of an individual **under age 65** and who is **disabled**; and
- Which is **established for the benefit of such individual through the actions of a parent, grandparent, legal guardian or a court**; and
- Which provides that the **State(s) will receive all amounts remaining** in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State Medicaid plan.

CAUTION: A trust which meets the exception to counting the trust under the SSI statutory trust provisions of Section 1613(e) must still be evaluated under the instructions in SI 01120.200, to determine if it is a countable resource. If the trust meets the definition of a resource (SI 01110.100B.1.), it would will be subject to regular resource-counting rules.

b. Under age 65

To qualify for the special needs trust exception, the trust must be established for the benefit of a disabled individual under age 65. This exception does not apply to a trust established for the benefit of an individual age 65 or older. If the trust was established for the benefit of a disabled individual prior to the date the individual attained age 65, the exception continues

to apply after the individual reaches age 65.

c. Additions to trust after age 65

Additions to or augmentation of a trust after age 65 (except as outlined below) are not subject to this exception. Such additions may be income in the month added to the trust, depending on the source of the funds (see SI 01120.201J) and may be counted as resources in the following months under regular SSI trust rules.

Additions or augmentation do not include interest, dividends or other earnings of the trust or portion of the trust meeting the special needs trust exception. If the trust contains the irrevocable assignment of the right to receive payments from an annuity or support payments made when the trust beneficiary was less than 65 years of age, annuity or support payments paid to a special needs trust are treated the same as payments made before the individual attained age 65 and do not disqualify the trust from the special needs trust exception.

d. Disabled

To qualify for the special needs trust exception, the individual whose assets were used to establish the trust must be disabled for SSI purposes under section 1614(a)(3) of the Act.

e. Established for the benefit of the individual

Under the special needs trust exception, the trust must be established for and used for the benefit of the disabled individual. SSA has interpreted this provision to require that the trust be for the sole benefit of the individual, as described in SI 01120.201F.2. Other than trust provisions for payments described in SI 01120.201F.2.b. and SI 01120.201F.2.c., any provisions that:

- provide benefits to other individuals or entities during the disabled individual's lifetime, or
- allow for termination of the trust prior to the individual's death and payment of the corpus to another individual or entity (other than the State(s) or another creditor for payment for goods or services provided to the individual), will result in disqualification for the special needs trust exception.

Payments to third parties for goods and services provided to the trust beneficiary are allowed under the policy described in SI 01120.201F.2.b.; however, such payments should be evaluated under SI 01120.200E through SI 01120.200F and SI 01120.201I to determine whether the payments may be income to the individual.

f. Who established the trust

The special needs trust exception does not apply to a trust established through the actions of the disabled individual himself or herself. To qualify for the special needs trust exception, the assets of the disabled individual must be put into a trust established through the actions of the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

In the case of a legally competent, disabled adult, a parent or grandparent may establish a "seed" trust using a nominal amount of his or her own money, or if State law allows, an empty or dry trust. After the seed trust is established, the legally competent disabled adult may transfer his or her own assets to the trust or another individual with legal authority (e.g., power of attorney) may transfer the individual's assets into the trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

NOTE: Under 1613(e) of the Act, a trust is considered to have been "established by" an individual if any of the individual's (or the individual's spouse) assets are transferred to the trust other by will. Alternatively, under the Medicaid trust exceptions in 1917(d)(4)(A) and (C) of the Act, a trust can be "established by" an individual who does not provide the corpus of the trust, or transfer any of his/her assets to the trust, but rather someone who took action to establish the trust. To avoid confusion, we use the phrase "established through the actions of" rather than "established by" when referring to the individual who physically took action to establish a special needs or pooled trust.

g. Legal authority and trusts

The person establishing the trust with the assets of the individual or transferring the assets of the individual to the trust must have legal authority to act with respect to the assets of that individual. Attempting to establish a trust with the assets of another individual without proper legal authority to act with respect to the assets of the individual will generally result in an invalid trust.

For example, a parent establishing a seed trust for his adult child with his or her own assets has legal authority over his own assets to establish a trust. He or she only needs legal authority over his child's assets if he or she actually takes action with the child's assets, e.g., transfers them to a previously established trust.

A power of attorney (POA) is legal authority to act with respect to the assets of a disabled individual. However, a trust established under a POA will result in a trust we consider to be established through the actions of the disabled individual himself or herself because the POA merely establishes an agency relationship.

h. State Medicaid reimbursement requirement

To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in the trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid payback may also not be limited to any particular period of time, i.e. payback cannot be limited to the period after establishment of the trust.

NOTE: Labeling the trust as a **Medicaid pay-back trust**, **OBRA 1993 pay-back trust**, trust **established in accordance with 42 U.S.C. § 1396p**, or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

2. Pooled trusts established under Section 1917(d)(4)(C) of the Act

a. General rules for pooled trusts

A pooled trust is a trust established and administered by an organization. It is sometimes called a "master trust" because it contains the assets of many different individuals, each in separate accounts established through the actions of individuals, and each with a beneficiary. By analogy, the pooled trust is like a bank that holds the assets of individual account holders.

Whenever you are evaluating the trust, it is important to distinguish between the master trust, which is established through the actions of the nonprofit association, and the individual trust accounts within the master trust, which are established through the actions of the individual or another person for the individual.

The provisions of the SSI trust statute do not apply to a trust containing the **assets of a disabled individual** which meets the following conditions:

- The pooled trust is established and maintained by a **nonprofit association**;
- **Separate accounts** are maintained for each beneficiary, but assets are pooled for

investing and management purposes;

- Accounts **are established solely for the benefit of the disabled individuals;**
- The account in the trust is **established through the actions of the individual, a parent, grandparent, legal guardian, or a court**; and
- The trust provides that to the extent any amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, **the trust will pay to the State(s)** the amount remaining up to an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under State Medicaid plan(s).

NOTE: There is no age restriction under this exception. However, a transfer of resources to a trust for an individual age 65 or over may result in a transfer penalty (see SI 01150.121).

CAUTION: A trust which meets the exception to counting the trust under the SSI statutory trust provisions of 1613(e) must still be evaluated under the instructions in SI 01120.200 to determine if it is a countable resource.

b. Disabled

Under the pooled trust exception, the individual whose assets were used to establish the trust account must meet the definition of disabled for purposes of the SSI program.

c. Nonprofit association

The pooled trust must be established through the actions of a nonprofit association. For purposes of the pooled trust exception, a nonprofit association is an organization established and certified under a State nonprofit statute. (For development, see SI 01120.203F).

d. Separate account

A **separate account within the trust** must be maintained for each beneficiary of the pooled trust, but for purposes of investment and management of funds, the trust may pool the funds in the individual accounts. The trust must be able to provide an individual accounting for the individual.

e. Established for the sole benefit of the individual

Under the pooled trust exception, the individual trust account must be established for the sole benefit of the disabled individual. (For a definition of sole benefit, see SI 01120.201F.2). Other than the payments described in SI 01120.201F.2.b. and SI 01120.201F.2.c., this exception does not apply if the trust account:

- provides a benefit to any other individual or entity during the disabled individual's lifetime, or
- allows for termination of the trust account prior to the individual's death and payment of the corpus to another individual or entity

f. Who established the trust account

In order to qualify for the pooled trust exception, the trust **account** must have been established through the actions of the disabled individual himself or herself or through the actions of the disabled individual's:

- parent(s);
- grandparent(s);
- legal guardian(s); or
- a court.

A legally competent, disabled adult who is establishing or adding to a trust account with his or her own funds has the legal authority to act on his or her own behalf. A third party establishing a trust account on behalf of another individual with that individual's assets must have legal authority to act with regard to the assets of the individual. An attempt to establish a trust account by a third party with the assets of an individual without the legal right or authority to act with respect to the assets of that individual will generally result in an invalid trust.

In the case of a trust established through the actions of a court, the creation of the trust must be required by a court order. Approval of a trust by a court is not sufficient.

g. State Medicaid reimbursement provision

To qualify for the pooled trust exception, the trust must contain specific language that provides that, to the extent that amounts remaining in the individual's account upon the death of the individual are not retained by the trust, the trust pays to the State(s) from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). To the extent that the trust does not retain the funds in the account, the State(s) must be listed as the first payee(s) and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203B.3.a.

The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular State(s). Medicaid

payback may also not be limited to any particular period of time, i.e., payback cannot be limited to the period after establishment of the trust.

NOTE: Labeling the trust as a **Medicaid pay-back trust, OBRA 1993 pay-back trust**, **trust established in accordance with 42 U.S.C. § 1396p**, or as an **MQT**, etc. is not sufficient to meet the requirements for this exception. The trust must contain language substantially similar to the language above. An oral trust cannot meet this requirement.

3. Allowable and prohibited expenses

The following instructions about trust expenses and payments apply to Medicaid special needs trusts and to Medicaid pooled trusts.

a. Allowable administrative expenses

Upon the death of the trust beneficiary, the following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):

- Taxes due from the trust to the State(s) or Federal government because of the death of the beneficiary;
- Reasonable fees for administration of the trust estate such as an accounting of the trust to a court, completion and filing of documents, or other required actions associated with termination and wrapping up of the trust.

b. Prohibited expenses and payments

Upon the death of the trust beneficiary, the following expenses and payments are examples of some of the types not permitted prior to reimbursement of the State(s) for medical assistance:

- Taxes due from the estate of the beneficiary other than those arising from inclusion of the trust in the estate;
- Inheritance taxes due for residual beneficiaries;
- Payment of debts owed to third parties;
- Funeral expenses; and
- Payments to residual beneficiaries.

NOTE: For the purpose of prohibiting payments prior to reimbursement of medical assistance to the State(s), a pooled trust is not considered a residual beneficiary.

c. Applicability

This restriction on payments from the trust applies upon the death of the beneficiary. Payments of fees and administrative expenses during the life of the beneficiary are allowable as permitted by the trust document and are not affected by the State Medicaid reimbursement requirement.

4. Reevaluate trusts processed under the policy in effect from 1/1/2000 through 1/31/01

a. Applicability

Trusts evaluated under the policy in effect from 1/1/2000 through 1/31/2001, that were found to meet the requirements of a Medicaid special needs trust or a Medicaid pooled trust, must be reevaluated under these instructions.

b. Policy change

These instructions contain a policy change that is effective prospectively from 2/1/2001. Under the prior policy, we did not count as a resource any trust meeting the requirements of a Medicaid special needs trust or a Medicaid pooled trust. Effective 2/1/2001, a trust determined to meet the requirements of a Medicaid special needs trust in SI 01120.203B.1. or Medicaid pooled trust in or SI 01120.203B.2. in this section must also be evaluated using the instructions in SI 01120.200. This is the case because even though a trust may meet the requirements for an exception to counting under Section 1613(e)(5) of the Act, a trust may still meet the definition of a resource and be countable. The special needs and pooled trust exceptions are **not** resource exclusions.

c. Trusts that become countable

If a trust previously not counted under the policy in effect 1/1/2000 through 1/31/2001 is now found to be a countable resource under SI 01120.200, we will not reopen the case retroactively, but will count the trust as a resource prospectively beginning with 2/1/2001. Any payments made to the individual between the month the case was initially adjudicated using the prior policy and the readjudication under these instructions are **not overpayments**. See SI 01120.203H in this section.

NOTE: The undue hardship waiver in SI 01120.203C in this section does **not** apply to trusts counted as resources under SI 01120.200. The waiver only applies to trusts counted under section 1613(e) (SI 01120.201 through SI 01120.203).

5. Income trusts established under Section 1917(d)(4)(B) of the Act

Income trusts, sometimes called *Miller* trusts (after a court case), established under section 1917(d)(4)(B) of the Act are **not** considered exceptions to trust rules for SSI eligibility purposes. However, some States may exclude these trusts from counting as a resource for Medicaid eligibility purposes.

C. Policy for waiver for undue hardship

1. Definitions

a. Undue hardship

For purposes of the trust provisions of section 1613(e) of the Act, undue hardship exists in a month if:

- failure to receive SSI payments would deprive the individual of food or shelter; **and**
- the individual's available funds do not equal or exceed the Federal benefit rate (FBR) plus federally administered State supplement, if any.

NOTE: Inability to obtain medical care does not constitute undue hardship for SSI purposes although it may under a State Medicaid plan. Also, the undue hardship waiver does not apply to a trust counted as a resource under SI 01120.200. It only applies to trusts counted under section 1613(e) of the Act (SI 01120.201 through SI 01120.203).

b. Loss of shelter

For purposes of this provision, an individual would be deprived of shelter if:

- he or she would be subject to eviction from their current residence if SSI payments were not received; and
- there is no other affordable housing available, or there is no other housing available with necessary modifications for a disabled individual.

2. Application of the undue hardship waiver

a. Applicability

We will consider the possibility of undue hardship under this provision only when:

- counting an **irrevocable** trust as a resource results in the individual's ineligibility for SSI

due to excess resources;

- the individual alleges (or information in the file indicates) that not receiving SSI would deprive him or her of food or shelter; and
- the trust specifically prohibits disbursements or prohibits the trustee from exercising his or her discretion to disburse funds from the trust for the individual's support and maintenance.

NOTE: Since an individual may revoke a revocable trust and access the funds for his or her support and maintenance, the requirements for undue hardship cannot be met if the individual established a revocable trust.

b. Suspension of resource counting

The counting of an irrevocable trust as a resource is not applicable in any month for which counting the trust would cause undue hardship.

c. Resource counting resumes

Resource counting of a trust resumes for any month(s) for which it would not result in undue hardship.

3. Available funds

In determining the individual's available funds we include:

a. Income

- All countable income received in the month(s) for which undue hardship is an issue.
- All income excluded under the Act received in the month(s) for which undue hardship is an issue. (See SI 00830.099 and SI 00820.500, respectively, for a list of unearned and earned income exclusions provided under the Act.)
- The value of in-kind support and maintenance (ISM) being charged, i.e., the presumed maximum value (PMV), the value of the one-third reduction (VTR), or the actual lesser amount.

(Do not include SSI payments received or items that are not income per SI 00815.000).
NOTE: The receipt of ISM, in and of itself, does not preclude a finding of undue hardship.

b. Resources

- All countable liquid resources as of the first moment of the month(s) for which undue hardship is at issue. (For a definition of liquid resources, see SI 01110.300).
- All liquid resources excluded under the Act as of the first moment of the month(s) for which undue hardship is at issue. (For a list of resource exclusions under the Act, see SI 01130.050).

SSI benefits retained into the month following the month of receipt are counted as a resource for purposes of determining available funds.

(Do not include nonliquid resources or assets determined not to be a resource per SI 01120.000).

4. Example

Frank Williams filed for SSI in 3/2008 as an aged individual. In 2/2008, he received an insurance settlement from an accident that was placed in an irrevocable trust. After determining that he met the other requirements for undue hardship (including a prohibition on the trustee from disbursing any funds for Mr. Williams' support and maintenance), the claims representative (CR) determined Mr. Williams' available funds. He receives $450 in title II benefits per month. His only liquid resource is a bank account that has $500 in it. The total of $950 in available funds ($450 title II and $500 bank account balance) means that undue hardship does not apply in 3/2008 because that amount exceeds the FBR. (His State has no federally-administered State supplement).

Mr. Williams comes back into the office in 6/2008. He presents evidence that he has spent down the $500 in his bank account on living expenses in the past 3 months. As of 6/2008, he has no liquid resources and his income total of $450 is below the $637 FBR. Mr. Williams meets the undue hardship test for 6/2008 (which is his E02 month). The trust does not count as his resource in that month. If his situation does not change, he will qualify for an SSI payment in 7/2008.

D. Procedure for developing Medicaid trust exceptions to resource counting

1. Special needs trusts under Section 1917(d)(4)(A) of the Act

The following is a summary of special needs trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION

1	Does the trust contain the assets of an individual who was under age 65 when the trust was established? (SI 01120.203B.1.b. in this section). • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Does the trust contain the assets of a disabled individual? (SI 011203B.1.d.) • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Is the disabled individual the sole beneficiary of the trust? (SI 01120.203B.1.e.) • If **yes**, go to **Step 4.** • If **no**, go to **Step 8.**
4	Did a parent, grandparent, legal guardian or a court establish the trust? (SI 01120.203B.1.f. in this section). • If **yes**, go to **Step 5**. • If **no**, go to **Step 8.**
5	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death as required in SI 01120.203B.1.h. in this section? • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	The trust meets the special needs trust exception to the extent that the assets of the individual were put in trust prior to the individual attaining age 65. Any assets placed in the trust after the individual attained age 65 are not subject to this exception, except as provided in SI 01120.203B.1.c. in this section. Go to **Step 7** for treatment of assets placed in trust prior to age 65. Go to **Step 8** for treatment of assets placed in trust after attaining age 65.
7	Evaluate the trust under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust (or portion thereof) does not meet the requirements for the special needs trust exception. Determine whether the pooled trust exception in SI 01120.203B.2. applies.

2. Pooled trusts established under Section 1917(d)(4)(C) of the Act

The following is a summary of pooled trust development presented in a step-action format. Refer to the policy cross-references for complete requirements.

STEP	ACTION
1	Does the trust account contain the assets of a disabled individual? (See SI 01120.203B.2.b. in this section) . • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Was the pooled trust established and maintained by a nonprofit association? (See SI 01120.203B.2.a., SI 01120.203B.2.c. and development instructions in SI 01120.203F in this section). • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the trust pool the funds, yet maintain an individual account for each beneficiary, and can it provide an individual accounting? (SI 01120.203B.2.d. in this section). • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.
4	Is the disabled individual the sole beneficiary of the trust account? (SI 01120.203B.2.e. in this section). • If **yes**, go to **Step 5**. • If **no**, go to **Step 8**.
5	Did the individual, parent(s), grandparent(s), legal guardian(s) or a court establish the trust account? (SI 01120.203B.2.a. and SI 01120.203B.2.f. in this section). • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	Does the trust provide specific language to reimburse any State(s) for medical assistance paid upon the individual's death from funds not retained by the trust as required in SI 01120.203B.2.g. in this section? • If **yes**, go to **Step 7**.

	• If **no**, go to **Step 8**.
7	The trust meets the Medicaid pooled trust exception, however, the trust still should be evaluated under SI 01120.200D.1.a. to determine if it is a countable resource.
8	The trust does not meet the requirements for the Medicaid pooled trust exception. Determine if the undue hardship waiver applies under SI 01120.203E in this section.

E. Procedure for development of undue hardship waiver

The following is a summary of development instructions for undue hardship presented in a step-action format. Refer to cross-references for complete instructions

STEP	ACTION
1	Is the trust irrevocable? • If **yes**, go to **Step 2**. • If **no**, go to **Step 8**.
2	Does counting the trust result in excess resources? • If **yes**, go to **Step 3**. • If **no**, go to **Step 8**.
3	Does the individual allege (or information in the file indicate) that not receiving SSI would deprive him or her of food or shelter according to SI 01120.203C.1. in this section? • If **yes**, go to **Step 4**. • If **no**, go to **Step 8**.
4	Obtain the individual's signed statement (on the DPST screen in MSSICS, or in non-MSSICS cases, on a SSA-795 faxed into NDRed) as to whether: • Failure to receive SSI payments would deprive the individual of food or shelter; • The individual's total available funds are less than the FBR plus federally administered State supplement; • The individual agrees to report promptly any changes in income and resources; and

	• The individual understands that he or she may be overpaid if available funds exceed the FBR plus State supplement for any month, or other situations change. • Go to **Step 5**.
5	Does the trust contain language that specifically prohibits the trustee from making disbursements for support and maintenance or that prohibits the trustee from exercising discretion to disburse funds for support and maintenance? • If **yes**, go to **Step 6**. • If **no**, go to **Step 8**.
6	Add up all of the individual's income, both countable and excludable (see SI 01120.203C.3.a. in this section). Do not include any SSI payments received or items that are not income per SI 00815.000. If the individual is receiving ISM, include as income the ISM being charged (PMV, VTR, or actual amount, if less). Add up all of the individual's liquid resources, both countable and excludable (See SI 01120.203C.3.b. in this section). Does the total of the income and the liquid resources equal or exceed the FBR plus federally administered State supplement, if any? • If **yes**, go to **Step 8.** • If **no**, go to **Step7**.
7	Suspend counting of the trust as a resource for any month in which all requirements above are met (SI 01120.203C.2 in this section). • In MSSICS, document the findings of undue hardship and applicable months in the **DROC** screen. • On paper forms, document the information in the **REMARKS** section. For further documentation, see SI 01120.202C and SI 01120.202D and for follow-up instructions, see SI 01120.203G in this section. **STOP**.
8	Undue hardship does not apply. However, in some instances where income and resource are currently too high, unless the trust is revocable, undue hardship may apply in future months.

F. Procedure for nonprofit associations

When a trust is alleged to be established through the actions of a nonprofit, or a tax-exempt

organization, follow policy and procedure for verifying tax-exempt status of organizations found at SI 01130.689E "Gifts to children with life-threatening conditions."

G. Procedure for follow-up to a finding of undue hardship

1. When to use this procedure

Use this procedure when it is necessary to determine whether an individual who established a trust continues to be eligible for SSI based on undue hardship. Since undue hardship is a month-by-month determination, recontact the individual to redevelop undue hardship periodically.

2. Recontact period

The recontact period may vary depending on the individual's situation. If the individual alleges, and information in the file indicates, that the individual's income and resources are not expected to change significantly and the individual is continuously eligible for SSI because of undue hardship, recontact the individual **no less than every six months**. If the individual's income and resources are expected to fluctuate or the file indicates a history of such fluctuation, the recontact period should be shorter, even monthly in some cases.

3. Documentation

At each recontact:

- Obtain the individual's statement either signed or recorded on a DROC that failure to receive SSI would have deprived the individual of food or shelter for any month not covered by a prior allegation;
- Determine whether total income and liquid resources exceeded the FBR plus State supplement for each prior month;
- If undue hardship continued for the prior period and is expected to continue in the future period, continue payment and tickle the case for the next recontact per SI 01120.203G.4. in this section.
- If undue hardship did not continue through each month, clear the **excluded amount** and **exclusion reason** entries on the **ROTH** screen for each month that undue hardship did not apply. Process the excess resources overpayment for those months. If undue hardship stops due to a continuing change in the individual's situation, e.g., income or resources, do not tickle the file to follow up. The individual must recontact SSA and

make a new allegation of undue hardship.

4. Recontact controls

Use the Modernized Development Worksheet (MDW) to control the case for recontact when the individual is eligible for SSI based on undue hardship. Set up an MDW screen using instructions in MSOM MDW 001.001 and the following MDW inputs:

- In the **ISSUE** field: input TRUST
- In the **CATEGORY** field: input T16MISC
- In the **TICKLE** field: input the date the individual should be recontacted to redevelop undue hardship
- In the **MISC** field: input information (up to 140 characters) about the trust undue hardship issue including issues to be aware of and anything else the CR deems appropriate in the case. If additional space is needed, use **REMARKS**.

H. Procedure for reevaluating revocable trusts processed under the policy In effect From 1/1/2000 through 1/31/2001

1. Policy change

These instructions represent a prospective policy change related to revocable Medicaid special needs trusts and Medicaid pooled trusts. The policy in effect from 1/1/2000 through 1/31/2001 provided for an exception to counting these trusts without regard to whether the trusts were resources under the general resource rules. Effective 2/1/2001, revocable Medicaid special needs trusts and Medicaid pooled trusts initially evaluated under the policy in effect 1/1/2000 through 1/31/2001 must be reevaluated under these instructions.

2. Identify trust cases

Identify any cases processed under the 1/1/2000 through 1/31/2001 policy.

a. Irrevocable trusts

You do not need to do anything additional with these cases.

b. Revocable trusts

You must reevaluate these cases prospectively from 2/1/2001, following the instructions in SI

01120.200, to determine if they meet the definition of a resource. If the trust meets the definition of a resource, it is subject to regular resource counting rules as of 2/1/2001.

c. Prior period

You do not need to reopen any period prior to 2/1/2001 and no overpayments will result for the prior period as a result of the policy change.

TN 48 (05-13)

SI 01120.199 Early Termination Provisions and Trusts

A. How to determine when to apply the policies in this section

1. New trusts and trusts that have not been previously excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that is either newly formed or not previously excepted from resource counting must meet all of the criteria set forth in SI 01120.199 through SI 01120.203 and SI 01120.225 through SI 01120.227, to be excepted under section 1917(d)(4)(A) or section 1917(d)(4)(C). Do not except such a trust from resource counting unless the trust meets all of these requirements.

2. Trusts that previously met the requirements to be excepted under section 1917(d)(4)(A) or (C) of the Act

A trust that was previously determined to be exempt from resource counting under Section 1917(d)(4)(A) or Section 1917(d)(4)(C) shall continue to be excepted from resource counting, provided the trust is amended to conform with the requirements of this section within 90 days. That 90-day period begins on the day the recipient or representative payee is informed that the trust contains provisions that must be amended in order to continue qualifying for the exception under Section 1917(d)(4)(A) or Section 1917(d)(4)(C).

Do not count a previously exempted trust as a resource during the 90-day amendment period. If the trust still fails to meet the requirements of this section after the expiration of the 90-day amendment period, begin counting the trust as a resource under normal resource counting rules.

NOTE: We permit each previously excepted trust only one 90-day amendment period.

B. Applicability of early termination provisions and trusts

This section provides the policy for evaluating special needs and pooled trusts established with the assets of an individual that contain early termination provisions. If certain criteria are met, such trusts can be excepted from counting as a resource under Section 1613(e)(5) of the Social Security Act (the Act). If the recipient or representative payee does not meet those criteria, you must evaluate such trusts under Section 1613(e) of the Act. For more information about evaluating trusts under Section 1613(e) of the Act, see SI 01120.201.

Use the instructions in this section to evaluate the following types of trusts:

- Special needs trust established under Section 1917(d)(4)(A) of the Act

For information on special needs trusts established under Section 1917(d)(4)(A) of the Act, see SI 01120.203.

- Pooled trusts established under Section 1917(d)(4)(C) of the Act

For information on pooled trusts established under Section 1917(d)(4)(C) of the Act, see SI 01120.203.

C. Case processing alert regarding early termination provisions and trusts

Trusts are often complex legal arrangements involving State law and legal principles that require obtaining legal counsel. Therefore, the following instructions may only be sufficient to recognize that an issue is present that you should refer to the regional office (RO) for possible referral to the Regional Chief Counsel (RCC). When in doubt, discuss the issue with the RO staff. You may resolve many issues by phone.

D. What is an early termination provision?

An early termination provision or clause would allow a trust to terminate before the death of the beneficiary. Commonly, such provisions or clauses provide for termination of the trust when, for example, the beneficiary is no longer disabled or otherwise becomes ineligible for Supplemental Security Income (SSI) and Medicaid, or when the trust fund no longer contains enough assets to justify its continued administration.

E. Defining terms for trusts

1. Trust

A trust is a property interest whereby property is held by an individual or entity (e.g., a bank) called the trustee, subject to a fiduciary duty to use the property for the benefit of another (i.e., the beneficiary).

2. Trust established with the assets of an individual

We consider a trust established with the assets of an individual, if any assets of the individual or spouse, regardless of how little, were transferred to a trust other than by a will. For more information on how to determine what we consider an "asset", see SI 01120.201B.2.

3. Grantor

A grantor, also referred to as a settlor or trustor, is the individual who provides the trust principal or corpus. The grantor must be the owner or have legal right to the property or otherwise be qualified to transfer it. For more information on grantors, see SI 01120.200B.2.

4. Trustee

A trustee is a person or entity who holds legal title to property for the use or benefit of another. In most instances, the trustee has no legal right to revoke the trust or use the property for his or her own benefit.

5. Trust beneficiary

A trust beneficiary is a person for whose benefit a trust exists. A beneficiary does not hold legal title to trust property, but does have an equitable ownership interest in it. As equitable owner, the beneficiary has certain rights that will be enforced by a court because the trust exists for his or her benefit. The beneficiary receives the benefits of the trust, while the trustee holds the title and duties.

6. Trust principal

The trust principal is the property placed in trust by the grantor which the trustee holds, subject to the rights of the beneficiary, and includes any trust earnings paid into the trust and left to accumulate. It is also called "the corpus of the trust."

7. Other definitions

For other definitions applicable to this section, see SI 01120.200B.

F. Policy for Section 1917(d)(4)(A) and Section 1917(d)(4)(C) trusts that contain an early termination provision

1. Criteria for determining whether an early termination clause is acceptable

For the purpose of SSI eligibility, a trust that contains an early termination provision or clause may not be excepted from the resource counting rules at Section 1613(e) of the Act unless it satisfies either the requirements in Section 1917(d)(4)(A) or (C). Additionally, a trust must also satisfy the resource counting rules found at SI 01120.200D and SI 01110.100B to not be a countable resource. In order to meet those requirements, all of the following criteria must be met:

- Upon early termination (i.e., termination prior to the death of the beneficiary), the State(s), as primary assignee, would receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s); and
- Other than payment for those expenses listed in SI 01120.199F.3. in this section and SI 01120.201F.2.c., no entity other than the trust beneficiary may benefit from the early termination (i.e., after reimbursement to the State(s), **all** remaining funds are disbursed to the trust beneficiary); and
- The early termination clause gives the power to terminate to someone other than the trust beneficiary.

NOTE: For trusts that are excepted from resource counting under Section 1917(d)(4)(C) as a pooled trust and do not contain an early termination clause, it is permissible for the trust to retain amounts remaining in the individual's account upon the death of the individual. For more information, see SI 01120.203B.2.

2. Exception for early termination clauses in Section 1917(d)(4)(C) trusts

For pooled trusts established under Section 1917(d)(4)(C), an early termination clause does not need to meet the above criteria if the clause solely allows for a transfer of the beneficiary's assets from one Section 1917(d)(4)(C) trust to another Section 1917(d)(4)(C) trust. The early termination clause must contain specific limiting language that precludes the early termination from resulting in disbursements other than to the secondary Section 1917(d)(4)(C) trust or to pay for the expenses listed in SI 01120.199F.3 in this section and SI 01120.201F.2.c.

3. Allowable administrative expenses paid from the trust

The following types of administrative expenses may be paid from the trust prior to reimbursement of medical assistance to the State(s):

- Taxes due from the trust to the State(s) or Federal government due to the termination of the trust; and
- Reasonable fees and administrative expenses associated with the termination of the trust.

For more information about allowable and prohibited expenses, see SI 01120.203B.3.

References

- SI 01120.200 Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
- SI 01120.201 Trusts Established with the Assets of an Individual on or after 1/1/00
- SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00

G. Procedure for the development and documentation of trusts established on or after 1/1/00

See SI 01120.202.

H. Examples of trust evaluations and determinations

The following examples are illustrative of situations that you may encounter. You should not rely solely on the analysis provided in the examples in making determinations in a specific case as laws vary from State to State and the language of individual trust documents may provide different results from those given in an example. You can refer to regional instructions, if any, and consult your regional office as necessary. Also, be aware of the implications that the trust may have for Medicaid eligibility. For more information on the effect upon Medicaid eligibility, see SI 01730.048.

1. Trust principal is a resource

EXAMPLE 1:

A disabled child is the beneficiary of a special needs trust that was established after 1/1/00 with assets of the child. The trust contains an early termination clause that states that, upon

early termination, all assets remaining in the trust will be distributed to the beneficiary.

The field office (FO) evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(A) trust (i.e., a special needs trust). However, the FO determines that the trust is a countable resource because, upon early termination, the document does not allow for reimbursement first to the State(s) for providing medical assistance to the trust beneficiary.

EXAMPLE 2:

A disabled individual, under age 65, is the beneficiary of a pooled trust that was established after 1/1/00 with the assets of the individual. The trust contains an early termination clause that states that, upon early termination, all assets remaining in the trust will be retained by the trust.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(C) trust (i.e., a pooled trust). However, the FO determines that the trust is a countable resource because, upon early termination, the State(s) is not designated as the primary assignee to receive all amounts remaining in the trust at the time of termination up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). Also, the trust allows for an entity other than the beneficiary (i.e., the trust) to benefit from the early termination.

EXAMPLE 3:

A disabled individual, under age 65, is the beneficiary of a special needs trust that was established after 1/1/00 with assets of the individual. The trust contains an early termination clause that gives the beneficiary the authority to terminate the trust and states that, upon early termination, first, the State(s) will be reimbursed for medical assistance provided to the trust beneficiary. Per the trust document, after reimbursement to the State(s), any remaining assets will be distributed to the beneficiary.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(A) trust (i.e., special needs trust). However, the FO determines that the trust is a countable resource because the early termination clause gives the beneficiary the authority to terminate the trust.

2. Trust principal is not a resource

EXAMPLE 1:

A disabled child is the beneficiary of a special needs trust that was established after 1/1/00 with assets of the individual. The trust contains an early termination clause that states that, upon early termination, first, the State(s) will be reimbursed for medical assistance provided to the trust beneficiary. Per the trust document, after reimbursement to the State(s), any

remaining assets will be distributed to the beneficiary. The clause bestows the power to terminate to the trustee, a bank.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(A) trust (i.e., a special needs trust). The FO determines that the early termination clause would not prevent the trust from meeting the criteria to be excepted from resource counting under the special needs trust exception. Additionally, the FO evaluates the trust under SI 01120.200D and determines that it is not a countable resource.

EXAMPLE2:

A disabled adult, under age 65, is the beneficiary of a pooled trust established after 1/1/00, with assets of the individual. The trust contains an early termination clause that states that, upon early termination, first, the State(s) will be reimbursed for medical assistance provided to the trust beneficiary. Per the trust document, after reimbursement to the State(s), any remaining assets will be distributed to the beneficiary. The clause bestows the power to terminate to the trustee.

The FO evaluates the trust document and determines that the trust meets the criteria of a Section 1917(d)(4)(C) trust (i.e., pooled trust). The FO determines that the early termination clause would not prevent the trust from being excepted from resource counting under the pooled trust exception. Additionally, the FO evaluates the trust under SI 01120.200D and determines that it is not a countable resource.

I. References

- SI 01120.200 Trusts – General, Including Trusts Established Prior to 1/1/00, Trusts Established with the Assets of Third Parties and Trusts Not Subject to Section 1613(e) of the Social Security Act
- SI 01120.201 Trusts Established with the Assets of an Individual on or after 1/1/00
- SI 01120.202 Development and Documentation of Trusts Established on or after 1/1/00
- SI 01120.203 Exceptions to Counting Trusts Established on or after 1/1/00
- SI 01150.100 What is a Resource Transfer
- SI 01150.121 Exceptions – Transfers to a Trust
- SI 01730.048 Medicaid Trusts

People First Language

What do you call a person with a disability? *A person.*

What words define who you are? The color of your skin or hair? Your age? Your weight? Of course not.

When words alone define a person, the result is a label—a label that often reinforces barriers created by negative and stereotypical attitudes. Every individual deserves to be treated with dignity and respect—regardless of gender, ethnicity, religion, sexual orientation, hair color, or anything else.

People First Language

People First Language is an objective and respectful way to speak about people with disabilities by emphasizing the person first, rather than the disability. It acknowledges what a person *has*, and recognizes that a person *is not* the disability. In putting the person before the disability, People First Language highlights a person's value, individuality and capabilities.

What should you say?

When referring to individuals with disabilities, be considerate when choosing your words. Focus on the person—and never use terms that label, generalize, stereotype, devalue or discriminate. Unless it is relevant to the conversation, you don't even need to refer to or mention the disability.

The following chart has some examples of People First Language.

Say This	Not This
people with disabilities	the handicapped, the disabled
people without disabilities	normal, healthy, whole or typical people
person who has a congenital disability	person with a birth defect
person who has (or has been diagnosed with)...	person afflicted with, suffers from, a victim of...
person who has Down syndrome	Downs person, mongoloid, mongol
person who has (or has been diagnosed with) autism	the autistic
person with quadriplegia, person with paraplegia, person diagnosed with a physical disability	a quadriplegic, a paraplegic
person with a physical disability	a cripple
person of short stature, little person	a dwarf, a midget
person who is unable to speak, person who uses a communication device	dumb, mute
people who are blind, person who is visually impaired	the blind
person with a learning disability	learning disabled
person diagnosed with a mental health condition	crazy, insane, psycho, mentally ill, emotionally disturbed, demented
person diagnosed with a cognitive disability or with an intellectual and developmental disability	mentally retarded, retarded, slow, idiot, moron
student who receives special education services	special ed student, special education student
person who uses a wheelchair or a mobility chair	confined to a wheelchair; wheelchair bound
accessible parking, bathrooms, etc.	handicapped parking, bathrooms, etc.

TEXAS COUNCIL *for* DEVELOPMENTAL DISABILITIES

6201 East Oltorf, Suite 600 • Austin, TX 78741
1.800.262.0334 • 512.437.5432 • www.txddc.state.tx.us

December 2011

Idioma de las Personas Primero

¿Cómo se le llama a una persona con una discapacidad? *Una persona.*

¿Cuáles son las palabras que lo definen a usted cómo es? ¿El color de su piel o de su cabello? ¿Su edad? ¿Su peso? Claro que no.

Cuando sólo se usan palabras para definir a una persona, el resultado es una etiqueta (una etiqueta refuerza las barreas que se crean por actitudes negativas y estereotípicas). Cada individuo merece ser tratado con dignidad y respecto, sin importar su sexo, origen étnico, religión, orientación sexual, color de su cabello, o ninguna otra cosa.

Idioma de las Personas Primero

El Idioma de las Personas Primero es una forma objetiva y respetuosa de hablar acerca de las personas con discapacidades al hacer énfasis en la persona primero, en vez de su discapacidad. Reconoce lo que la persona tiene, y reconoce que una persona no es la discapacidad. Al poner a la persona antes de la discapacidad, el Idioma de las Personas Primero destaca el valor, la individualidad y las capacidades de una persona.

¿Qué debe decir?

Cuando se dirige a individuos con discapacidades sea cuidadoso con las palabras que selecciona. Enfóquese en la persona (y nunca use palabras que etiquetan, generalizan, encasillan o discriminan). No necesita hacer referencia o mencionar la discapacidad, salvo que sea relevante para la conversación.

La siguiente tabla muestra algunos ejemplos del Idioma de las Personas Primero.

Diga esto	No esto
personas con discapacidades	los discapacitados, los inválidos
personas sin discapacidades	personas normales, sanas, enteras o típicas
personas que tienen una discapacidad congénita	personas con un defecto de nacimiento
persona que tiene (o ha sido diagnosticada con)...	persona aquejada con, sufre de, una víctima de...
persona que tiene síndrome de Down	persona Down, mongólico
persona que tiene (o ha sido diagnosticada con) autismo	el autista
persona con tetraplejia, persona con paraplejia, persona diagnosticada con una discapacidad física	una tetrapléjico, un parapléjico
persona con una discapacidad física	un tullido
persona de estatura corta, persona pequeña	un enano
persona incapaz de hablar, persona que usa un dispositivo de comunicación	tonto, mudo
personas que están ciegas, personas con problemas de la vista	los ciegos
persona con una discapacidad del aprendizaje	discapacitado en el aprendizaje
persona diagnosticada con una condición de salud mental	loco, psicópata, enfermo mental, trastornado emocional, demente
persona diagnosticada con una discapacidad cognitiva o con una discapacidad intelectual o en el desarrollo	retardado mental, retardado, lento, idiota, tarado
estudiante que recibe servicios educativos especiales	estudiante de educación especial, estudiante "special ed"
persona que usa una silla de ruedas o silla para la movilidad	limitado a una silla de ruedas, constreñido a una silla de ruedas
estacionamiento, servicios sanitarios accesibles, etc.	estacionamiento, servicios sanitarios accesibles, etc. para discapacitados

Texas Council for Developmental Disabilities

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diciembre 2011

The following document is a sample *first-party special needs trust, drafted by a Georgia attorney and annotated by a pin-headed academic, in each case merely for illustration and educational purposes. It was crafted with a view of Georgia law and qualification as a special needs trust under the Georgia administration of the Medicaid rules, which means that it may not be appropriate in every respect for use in other jurisdictions. Moreover, things change and it will become stale. Heck, it may contain errors from its inception. So users are advised to regard it with customary caution. And the authors disclaim all responsibility for anyone's reliance on it.*

Note that getting started with the drafting of any document is difficult, especially one such as this. Most practitioners will begin the challenge with a reasonably reliable template obtained from a local group of practitioners. Drafting from scratch is scary and foolhardy, but reliance on the work of others has its dangers, too. To locate excellent resources for becoming a knowledgeable drafter of special needs trusts consult the Academy of Special Needs planners at specialneedsplanners.com and the Special Needs Alliance at specialneedsalliance.org.

THOMAS CHARLES SMITH
IRREVOCABLE SUPPLEMENTAL CARE TRUST

THIS AGREEMENT is made and entered into as of the _____ day of _____, 2012, by and between JAMES PAUL JONES, as the Court-appointed Conservator of THOMAS CHARLES SMITH, as the Settlor, and RELIABLE BANK & TRUST, N.A., as the initial Trustee, and

W I T N E S S E T H, That:[1/]

WHEREAS, the Settlor, in his capacity as the Court-appointed Conservator of Thomas Charles Smith, has agreed to serve as the Settlor of an irrevocable supplemental care trust under 42 U.S.C. Section 1396p(d)(4)(A), for the sole benefit of Thomas Charles Smith (the "Trust"), for the purpose of establishing the Trust to receive certain funds to which Thomas Charles Smith is entitled[2/] as a result of the settlement of Civil Action File No. _____, filed in the _____ Court,

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1. These first three introductory paragraphs may be useful to "explain" what is being done in the document, but they are necessary only if the court that is involved requires such a form. Under 42 U.S.C. §1396p(d)(4)(A), this self-settled first-party sole-beneficiary special needs trust does not require the involvement of the local court unless the Beneficiary is a minor or an incapacitated adult, but when a settlement recovery is involved it is common for the court overseeing that litigation to approve creation of the trust.

   An important requirement is that, if not created by one of the statutorily allowed actors (parent, grandparent, or a court-appointed guardian or conservator), then the trust must be more than merely "approved" by the local court. It must actually be required and created by order of the court. See POMS SI 01120.203.B.1.f.

2. This sample form of d4A special needs trust is created "on behalf of" Thomas Charles Smith, using funds recovered on his behalf in tort litigation. The document refers to the conservator as settlor of the trust, but the trust is regarded as a "self-settled" special needs trust because the conservator is acting on behalf of the plaintiff in that case and is funding the trust with the plaintiff's recovery, to be held for the plaintiff's sole benefit. As such, notwithstanding the labels used in this paragraph, this is a first-party special needs trust, subject to the d4A requirements. Most important of those are the sole-benefit and "payback"

to be held and used by Reliable Bank & Trust, N.A., as Trustee of the Trust, upon the uses and trusts hereinafter set forth (the "Trust Agreement"); and

WHEREAS, the _____ Court has reviewed the concept and funding of the Trust, and has reviewed the provisions of the Trust Agreement, and has approved same as being in the best interests of the said Thomas Charles Smith (although such Court has not retained continuing supervision of, or jurisdiction over, the Trust);[3/]

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged,[4/] the Settlor does hereby establish the Trust, so that the Trustee may receive the property detailed on the attached Exhibit A, all of the provisions of which are hereby expressly incorporated in this Trust Agreement, to have and to hold the same, in trust, for the sole benefit of Thomas Charles Smith, for and during his lifetime, upon the uses and purposes, and subject to the terms, provisions, conditions and powers, hereinafter set forth.

ITEM I: IRREVOCABILITY[5/]

The Settlor has been fully advised and understands and declares that the Trust is, and shall be, irrevocable, except as otherwise expressly provided herein, and that after the execution of the Trust Agreement, the Settlor shall have no right, title or interest in, or power, privilege or incident of ownership in regard to, any of the property in the Trust. Except as otherwise expressly provided herein, neither the Settlor, nor any beneficiary of the Trust, shall have any right to alter, amend, revoke or terminate the Trust or any of its provisions. It is expressly contemplated and intended that the express irrevocability of the Trust, as stated herein, shall overrule, override and obviate the need for reliance upon any rule of law or construction such as the "Doctrine of Worthier Title," the "Settlor-Sole Beneficiary Rule," the "Rule in Shelley's Case," the "Doctrine of Merger," or the like.[6/] Notwithstanding the irrevocability of this Trust, the Trustee may amend this Trust Agreement solely to ensure its compliance, or continued compliance, with the relevant provisions of 42 U.S.C. Section 1396p(d)(4)(A), and any regulations promulgated thereunder, or any related statutes, including federal or state statutes consistent with the provisions and purpose of same, and any amendments or successor statutes thereto, any relevant provisions of the Program Operations Manual System maintained by the

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aspects, which distinguish this trust from a third-party special needs trust – as to which neither requirement applies.

3. The personal injury recovery in such a case may be significant, and the Beneficiary may not have a shortened life expectancy, notwithstanding the Beneficiary's disability (which may have been caused by the personal injury, but that also is not a requisite). Given the size and expected duration of the trust, a corporate trustee may be appropriate for a variety of reasons, not the least of which is to better protect the funds from family or other "interested parties" who perceive a "pot of gold" to which they want access. This trust is drafted with the same care and concerns that might inform any estate planning trust document that must extend for the normal life expectancy of a beneficiary who will live to a significant age.
4. This statement is no more true here than it is in other similar documents in which such boilerplate is found.
5. A d4A special needs trust must be irrevocable. See POMS SI 01120.201.D.1.
6. The Social Security Administration and some state Medicaid bureaucrats have sought to invalidate d4A trusts on the grounds of these old and typically superseded state law doctrines, or rules that may not clearly be relegated to the dust bin of history.

Social Security Administration,[7] and any case law or other judicial pronouncements or authority relevant to same, and, pending such amendment, no provision of the Trust Agreement shall be recognized or given effect to the extent that such provision would render the Trust non-compliant with same. The Trustee is authorized, in the Trustee's sole discretion, to initiate any administrative or judicial proceedings, or both, for the purpose of determining the necessity or efficacy of any such amendment hereunder. All costs relating thereto, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. If, and for so long as required by any relevant state Medicaid program(s), or by the Social Security Administration, or by any of their delegates or their successors-in-interest, the Trustee shall give written notice to same regarding any such amendment of the Trust Agreement within five days of the execution of such amendment.

ITEM II: TRUST BENEFICIARY

The sole beneficiary of the Trust is, and shall be, Thomas Charles Smith, a disabled person as defined in 42 U.S.C. Section 1382c(a)(3), for and during his lifetime (hereinafter called the "Beneficiary"), until the termination of the Trust in accordance with the provisions of the Trust Agreement. The Beneficiary's date of birth is July 4, 2001.[8] As a minor child, the Beneficiary is thus subject to the legal incapacity of minority, and has not yet been judicially declared to be an incapacitated adult.[9]

ITEM III: ADDITIONS TO TRUST

Others shall have the right at any time to add to the Trust prior to the Beneficiary's sixty-fifth birthday[10] by depositing additional property with the Trustee hereunder for the sole benefit of

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7. By way of illustration, POMS SI 01120.201.F.2 was revised in May 2012 to add Example 1 illustrating a trust that failed the "sole benefit" requirement to qualify, because the trustee was permitted to pay for travel by family members to visit the Beneficiary. After promulgation of such a change it would be appropriate for any trustee to amend any similar offending provision to preclude future disqualification of a trust that previously was compliant.

8. Date of birth is important to inform the qualification requirement that the disabled beneficiary for whose sole lifetime benefit the trust exists was under age 65 when the trust was created.

9. Articulating the nature of the Beneficiary's disability is important because details of the Beneficiary's disability help inform the qualification requirement that the trust's settlor has legal authority to act with respect to the Beneficiary's assets. See POMS SI 01120.203.B.1.g. If the Beneficiary is a minor or an incapacitated adult the settlor of the d4A trust should be a court-appointed conservator or guardian. A "seed trust" may be established by the parent or grandparent of an adult beneficiary who is a disabled but mentally competent, to which the Beneficiary may add the Beneficiary's own property. See POMS SI 01120.203.B.1.f.

10. The expectation here is that the other contributors to the trust will be individuals who for any reason hold funds owed to the Beneficiary (such as child support or alimony payments) or who are in receipt of personal injury settlement amounts on behalf of the Beneficiary. In some cases these settlement amounts may be ongoing payments, such as a lifetime annuity, that will be paid until the Beneficiary dies, which could occur after age 65. In such a case addition of the *right to receive* the annuity payments prior to age 65 would satisfy the limitation in this first sentence. In this regard see POMS SI 01120.203.B.1.c.

the Beneficiary, provided that such property is acceptable to the Trustee, and all property so deposited shall be held and distributed by the Trustee in all respects as if it had been a part of the property originally deposited hereunder. Such additional property, if any, together with the property detailed on Exhibit A, as aforesaid, together with any income or accruals with respect thereto, shall constitute the property of the Trust.

ITEM IV: "SUPPLEMENTAL CARE"[11] DISTRIBUTIONS

(a) Subject to the express requirements of Paragraph (i)[12] of this Item IV, the Trustee shall hold, manage, invest and reinvest the Trust property, and shall be authorized to pay to, or use for the benefit of, the Beneficiary such part of the income and principal of the Trust as the Trustee may, in the Trustee's sole and absolute discretion,[13] deem reasonable or necessary for the

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Additions must be made prior to age 65 because otherwise it would be an improper end-run on the under-age-65 requirement if a trust could be created with minimal funds prior to age 65 and then substantial funds added thereafter.

There is an issue whether it is wise for additional grantors to make contributions to a d4A trust, given that third party funds need not be subject to the payback requirements otherwise applicable to this trust. In addition, having multiple grantors is "messy" for Subpart E – income tax grantor trust – purposes. And any such addition would constitute a taxable gift as to which no gift tax Crummey power would be allowed in this document, to qualify for the annual exclusion. Nevertheless, these issues may be insignificant if the amounts involved are not great. Moreover, an inheritance or direct gift made outright likely would disqualify the beneficiary for entitlement programs, particularly if little or no wealth is likely to remain when the beneficiary dies, meaning that payback is not a real issue.

11. Special needs trust drafters differ in their use of terminology, some even believing that there is a regulatory difference between the terms "supplemental needs" and "special needs." The author of this form prefers "supplemental care special needs trust" but it is a difference with no practical significance.

12. This reference is to the Medicaid payback provision, required in all d4A trusts, found in Item IV(i) at page 13 of this form.

13. The term "sole" discretion or "sole and absolute discretion" appears at least three dozen times in this document. As a drafting matter it could be eliminated from every one of these locations and a single provision (such as an expansion of the text accompanying annotation 26) instead could articulate the drafter's intent. Which is that this special needs trust exists to preclude state authorities from asserting that the Beneficiary has sufficient rights to disqualify the Beneficiary for entitlement programs. The intent is to prevent the Beneficiary from having greater rights than those meant to be granted. In this way the drafter seeks to preclude the Beneficiary (or anyone acting on behalf of the Beneficiary) from being able to force the trustee to make any distribution or exercise its discretion in any manner. Terms used, such as that the trustee has "unfettered" or "absolute" discretion, are meant to establish that the Beneficiary has no countable resource or entitlement in the trust.

There is, however, no such thing as absolute or unfettered discretion of a trustee. To be a valid trust the fiduciary's exercise of discretion must be subject to review, which is provided in a most restrictive manner by this provision. Austin Wakeman Scott, William F. Fratcher, & Mark L. Ascher, Scott and Ascher on Trusts §§13.2.3, 18.2 (5th ed. 2007): "The terms of the trust may enlarge the trustee's discretion by use of qualifying adjectives or phrases such as 'absolute,' 'sole,' 'uncontrolled,' or 'unlimited.' Such terms are not, however, interpreted literally; they do not confer on the trustee unlimited discretion," citing Uniform Trust Code §814(a): "Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as 'absolute', 'sole', or 'uncontrolled', the trustee shall

"supplemental care" of the Beneficiary (as defined in Paragraph (b), below), subject to the strict limitations set out in this Trust Agreement, and without order of, or report to, any court or other administrative entity, except as expressly provided herein. The Trustee's sole, independent judgment and discretion in making, or declining to make, disbursements of the property of the Trust, as provided for hereinbelow, shall be final and binding on all persons interested in this Trust, including any public or private governments, agencies or entities. No court or other entity or person may substitute its judgment for the decisions of the Trustee regarding disbursements of the property of this Trust. Any income of the Trust not currently expended shall be accumulated and added to the principal of the Trust.

(b) As used in this Trust Agreement, the "supplemental care" of the Beneficiary shall encompass non-support disbursements that would not otherwise be fully paid for by any local, state or federal governments or agencies, or any private agencies or sources, which provide financial or other assistance to persons with a disabling condition such as the Beneficiary, or by any private insurance carrier required to cover the Beneficiary. The property of this Trust shall constitute a fund to supplement, and not to supplant, any benefits that the Beneficiary receives, or would be entitled to receive, as a result of his disabling condition, from any such governments, agencies, sources and insurance carriers.[14/] In exercising the Trustee's sole and absolute discretion hereunder to disburse any property of the Trust to, or for the benefit of, the Beneficiary, the Trustee shall take into consideration all factors that the Trustee deems pertinent, including (but not limited to) any benefits the Beneficiary receives, or would be entitled to receive, as a result of his disabling condition from any local, state or federal governments or agencies, or from any private agencies, as determined in the sole judgment of the Trustee, as well as the actual and projected availability of trust funds (and collateral resources) relative to the projected medical and health care needs of the Beneficiary as ascertained from the Beneficiary's life care plan[15/] and other relevant data and input relating to same, with priority to be given to such medical and health care needs. Examples of such non-support disbursements for the benefit of the Beneficiary, assuming that there are no private or public funds otherwise available to fully

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exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

In some cases the term "sole" is meant to establish that a trust committee, trust protector, trust advisor (or similar third-party reviewer or advocate for the Beneficiary) may make recommendations that the trustee must consider but that decisions, such as regarding distributions or investments, are the exclusive province of the trustee.

14. This nonsupport aspect is the most critical aspect of the special-needs or supplemental-needs trust concept. These trusts would essentially disqualify the Beneficiary for Supplemental Security Income or Medicaid benefits if distributions could satisfy, supplant, or displace benefits that are provided by those entitlement programs. Thus, the document *must* provide that no distributions may be made that have such effect.

15. A life care plan is an objective assessment of the Beneficiary's anticipated special needs and the estimated cost of providing for them. It identifies medical and nonmedical services, products, equipment, educational and life-enhancing experiences, and housing options that will benefit the disabled beneficiary. The plan usually is developed by a "life care planner," who may have a medical background as a nurse, physician, or rehabilitation therapist, but this emerging profession is unregulated and lacks consistent qualification prerequisites or standards for practice. Consult the American Association of Nurse Life Care Planners at aanlcp.org, and the International Association of Rehabilitation Professionals Academy of Life Care Planners Section at rehabpro.org for more information.

pay for[16] same, which may be appropriate for the Trustee to make under this Trust Agreement, could include (but not be limited to) the following:[17]

(1) Any and all reasonable expenses incident to the preparation and implementation of a life care plan and individualized written rehabilitation plan for the Beneficiary (and periodic updates thereto), as recommended by the Beneficiary's life care planners, physicians, care managers, therapists, counselors, technicians, rehabilitation specialists, nutritionists, home modification and accessibility specialists, or other care providers, including, but not limited to, the reasonable compensation and other appropriate expenses of such persons and advisors;

(2) Medical, dental, podiatric, rehabilitative, therapeutic and diagnostic treatments, therapies, interventions, evaluations, care and equipment, and all related supplies, whether or not experimental, necessary or life-saving, including, but not limited to, prosthetic and orthotic devices, mobility and adaptive aids, stabilizers, monitors, appliances, braces, wheelchairs (powered or manual), adaptive tools and instruments, and the cost of maintaining, repairing, upgrading and periodically replacing same;[18]

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16. The trustee may make distributions for support items such as food and shelter to the extent funds provided by the entitlement programs are insufficient. See POMS SI 01120.200.E.1.b. and 01120.200.F regarding the impact on the Beneficiary's means-tested entitlements if distributions for food or shelter (as defined by Social Security) constitute "in-kind support and maintenance" to the Beneficiary.

17. Special needs trust drafters differ on the degree of specificity that they provide in a provision such as this, which may reflect personal style or the regulators with whom they deal at the state level. One danger with being too specific is that failure to specifically mention an item could be interpreted as meaning that it was meant to be excluded, which explains why this document includes the phrase "including, but not limited to" (or variations thereon) over three dozen times (five times in paragraph (3) alone!).

    Some drafters prefer to omit the detailed list found here and instead refer to a letter of intent that will accompany the trust, often detailing the sorts of items that are meant to be allowed and also identifying matters such as the Beneficiary's preferences and dislikes, medical or personal information, or other special circumstances that the trustee might find useful or important but that need not (or should not) appear in the trust document itself. For example, it might be wise to indicate that certain relatives have been avaricious in their desire to "enjoy" the Beneficiary's resources, individuals who – for whatever reason – should be kept at a distance from the Beneficiary, or those for whom the Beneficiary has a particular affinity and whose presence should be encouraged, to the point of expending trust funds to facilitate their access to the Beneficiary as much as possible.

18. A second matter regarding drafting style is highlighted in this paragraph. The author of this document does not use serial commas. For example, a comma would separate "upgrading" in the last line and "potentially replacing" if these are different concepts, but the lack of a comma in the term "mobility and adaptive aids" is appropriate if those are of a like kind and should be conjoined. The point of this annotation is *not* about punctuation preferences, which are not important to this learning experience. Instead, the point is about editing another drafter's document, which in this context could yield a costly error in an effort to adapt a form to the user's preferred style.

    Speaking from experience, there are aspects of special needs trust drafting that reflect important and sometimes subtle items of compromise and negotiation with the bureaucrats who administer the Medicaid program in the drafter's home state and that may not reflect pristine style but that work and, therefore, ought to be left alone, because the bureaucrat expects to see them and may disapprove of a document that differs. Unless an experienced

(3) Professional therapy, behavior and pain management programs, whether or not experimental, necessary or life-saving, including, but not limited to, occupational, speech, language and communication, physical (including, but not limited to, massage therapy and acupuncture), psychological, audiological, recreational (including, but not limited to, aquatic therapy, equine hippotherapy and therapeutic horseback riding), social skills, emotional and behavioral therapy and counseling, and all related costs, including, but not limited to, all equipment, tools or supplies utilized in connection therewith (including, but not limited to, hyperbaric chambers and related technology), and the related costs of training the Beneficiary, his family, educators and care givers to realize for the Beneficiary the maximum benefits therefrom;

(4) Medical and health care needs of all types, including, but not limited to, physicians' office visits, prescription and over-the-counter medications, evaluations, treatments, injections, surgeries, laboratory tests, procedures, hospitalizations and diagnostics;

(5) Reasonable compensation and appropriate expenses of the Beneficiary's guardians, conservators or custodians, if any (including, but not limited to, statutory commissions payable to same under relevant state law), and other care givers, whether professional, para-professional, rehabilitative, vocational, attendant, respite or custodial, as well as for the services of a care manager or other advisor who is experienced in overseeing the implementation of life care plans similar to that of the Beneficiary, and who is familiar with related governmental or private entitlement or assistance programs;

(6) Attendant care and adaptive aids and equipment, and related supplies, for the Beneficiary's personal needs, including, but not limited to, bathing, dressing, grooming, hygiene, incontinence care and supplies, skin care, nutrition and meal preparation, and other activities of daily living, as well as domestic services and other household maintenance services to accommodate the needs of the Beneficiary while he is living in a private or semi-private residential, or institutional, setting;

(7) Private insurance coverage for the Beneficiary, including, but not limited to, premiums attributable to health, disability, and accident insurance, as well as co-payments and deductible amounts with respect to any insurance covering the Beneficiary;

(8) The reasonable travel costs of the Beneficiary, and at least one travel companion, associated with access to medical and health care services of all types;

(9) Educational and training needs and opportunities of all types, including, but not limited to, tuition, room, board and all related costs, at private or public institutions, including special education aides and assistants, as well as home schooling or private tutoring outside of the traditional educational setting, including educational or workshop programs specializing in serving persons with impairments such as those of the Beneficiary, together with any books, supplies or other materials recommended for the Beneficiary in connection therewith;

(10) The reasonable travel and transportation costs of the Beneficiary, and at least one travel companion, to and from any school or residential accommodation which is

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hand is overseeing all changes made, it is remarkably easy to make an unintended and costly mistake if the editor is not totally familiar with the rules and administration involved. Strong as may be the desire to "improve" a form, rookies are strongly advised to leave their red pencil in the drawer until they are well-steeped in the law and the lore of this area of practice.

removed from the residence of the Beneficiary's immediate family members and his legal guardian of the person, if any;

(11) The purchase or financing (in whole or in part) of a private residence suitable for an individual with disabilities such as those of the Beneficiary, customized and adapted to accommodate his limitations and medical needs, with title to such real estate to be held by the Trustee as an asset of the Trust, as well as the expense of securing (including, for this purpose, the installation and maintenance of an emergency communications system), insuring (at its replacement cost) and maintaining such residence, and the land adjoining same, in good condition and repair; provided, however, that the cost of any such private residence shall not exceed 20% of the initial property of the Trust,[19] as detailed on the attached Exhibit A;

(12) Alterations or adaptations (structural and nonstructural alike) to a pre-existing residence inhabited by the Beneficiary, but not titled in the name of the Trust, which are necessary or advisable to accommodate his limitations and medical needs, as well as the expenses of securing (including, for this purpose, the installation and maintenance of an emergency communications system), insuring (at its replacement cost) and maintaining such residence, and the land adjoining same, in good condition and repair. Prior to commencing and funding any such alterations or adaptations to a pre-existing residence inhabited by the Beneficiary, but not titled in the name of the Trust, the cost of which is expected to exceed Ten Thousand Dollars ($10,000),[20] the Trustee shall obtain an appraisal of the then fair market value of the residence (the "Original Appraisal"), to be rendered by a qualified appraiser selected by the Trustee with reasonable care. Thereafter, upon completion of the said alterations or adaptations to such residence, the Trustee shall obtain a follow-up appraisal of the fair market value of the residence (the "Follow-Up Appraisal"). The increased value of the residence, if any, attributable to alterations or adaptations funded by the Trust, as reflected by the said appraisals, shall constitute an asset of the Trust, payable back to the Trust only upon the sale of the residence,[21] subject to the limitations set forth hereinbelow. The Trustee shall be entitled to rely absolutely on, and shall not be liable for, the work product of any appraiser hired by the Trustee with reasonable care for the valuations described herein, which shall be binding on all persons interested in this Trust. In the event of a sale of the residence, the sales proceeds, after payment of all expenses incurred in connection with said sale, including, without limitation, the payment of any valid liens secured by the residence, shall be allocated as follows: (A) first, to the legal owner of the residence, that portion of the proceeds equal to the fair market value of the residence as indicated by the Original Appraisal; (B) next, to the Trustee, that portion of the remaining proceeds, if any, equal to the increased value of the residence, if any, attributable to the aforementioned alterations or adaptations funded by the Trust, as indicated by the Follow-Up Appraisal; and (C) finally, the balance of the proceeds, if any, to the legal owner of the residence. The Trustee shall not be liable to any person named or described in this Trust Agreement, or otherwise interested in this Trust,

19. The 20% provision is not mandated by the POMS or any other qualification requirement. Instead it was the preference of the corporate fiduciary that this trust named as trustee.

20. The $10,000 provision is not mandated by the POMS or any other qualification requirement. Instead it was the preference of the corporate fiduciary that this trust named as trustee.

21. The increased value attributable to any alterations or adaptations is not a trust asset even if the trustee secures a lien or structures the payment for these changes as a loan, but the payback provisions required in a d4A trust make an effort such as this provision necessary, to recoup the value invested in a dwelling that is not owned by the trust.

if the said proceeds remaining after the allocation described in Subparagraph (A), above, are insufficient to satisfy fully the allocation described in Subparagraph (B), above. Any of the foregoing provisions of this Paragraph to the contrary notwithstanding, the Trustee, prior to commencing and funding any alterations or adaptations to a pre-existing residence inhabited by the Beneficiary, as contemplated herein, may require the owner of the dwelling, or the Beneficiary or his legal guardian, conservator or other legal representative, if any, to cooperate with the Trustee by executing such documents as the Trustee, in its sole and absolute discretion, deems necessary or advisable to protect the interest of the Trust in the increased value of the residence, if any, attributable to the said alterations and adaptations funded by the Trust, as aforesaid;

(13) The costs of the Beneficiary's residence in an assisted living environment, on a long-term or short-term basis, including, but not limited to, the cost of his accommodations, including private room, board, vocational and workshop services, and related incidentals (provided, however, that such costs are not otherwise defrayed by any public or private entitlement or assistance programs for which the Beneficiary is, or may be, eligible as a result of his disability, as provided above);

(14) The purchase or lease of appropriate modes of transportation for the Beneficiary, including, but not limited to, vans or automobiles[22] which are specially equipped and adapted for the Beneficiary's particular limitations (or the costs of equipping and adapting an existing vehicle to accommodate the Beneficiary's said limitations), the costs of insuring, maintaining, fueling, repairing and periodically replacing same, and the costs of installing and maintaining an appropriate emergency communications system therein, including, but not limited to, a satellite location system such as "On Star," with title thereto to be held as determined by the Trustee to be in the best interest of the Beneficiary and the Trust;

(15) Appropriate home-based and community-based recreational opportunities and social initiatives and activities, including, but not limited to, membership in community facilities such as the local Jewish Community Center and YMCA/YWCA, as well as the costs of summer camp (especially programs utilizing assistive technology and augmentative communication elements), hobbies and extracurricular activities, and the out-of-pocket and travel costs of the Beneficiary, and at least one travel companion, associated therewith;

(16) Appropriate furniture and furnishings for the residence of the Beneficiary, whether in a private residence or in an assisted living environment, customized and adapted to accommodate his limitations, and periodic replacements of same;

(17) Appropriate periodic vacation and sabbaticals for the Beneficiary, including, but not limited to, the reasonable travel costs of the Beneficiary (including, but not limited to, related costs such as luggage appropriate for the use of the Beneficiary), and at least one travel companion, associated therewith;

(18) Television, audio and video cassette recorders,[23] computers, augmentative communication systems and related software and hardware, other electronics or machines which might enhance the Beneficiary's quality of life, and the related costs of appropriate

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22. POMS SI 01120.201.F.1 requires that the title to any such vehicle be held by the trust, which many trustees will resist.

23. Obviously documents become stale. Editing to make them more current can improve them in certain circumstances but, as stated in annotation 18, great care is required so as not to mess up an otherwise qualified document.

training for the Beneficiary, his family, educators and care givers in the proper use thereof;

(19) Professional services rendered for the benefit of the Beneficiary, including, but not limited to, legal, fiduciary, accounting and bookkeeping services and advice;

(20) Pre-paid[24] funeral and burial services for the Beneficiary, including, but not limited to, embalming or cremation services, an appropriate casket, vault or urn, an appropriate plot and marker, and all related necessary professional funeral services, and the cost of an appropriate insurance policy to secure payment of some or all of such services and expenses;

(21) The reasonable expenses of purchasing, maintaining and caring for an animal companion for the Beneficiary, or specially trained medical, therapy or service animals, if his guardian, conservator or custodian believes such would be in his best interest, and if the rules and guidelines of his residence would so permit;

(22) The satisfaction of any valid claims for reimbursement of medical assistance benefits paid on behalf of the Beneficiary prior to the establishment of the Trust[25] which, in the opinion, and at the direction, of the Beneficiary's legal counsel, the Beneficiary is legally required and obligated to satisfy to assure the effectiveness of the Trust under 42 U.S.C. Section 1396p(d)(4)(A), and any additional regulations promulgated thereunder, or any related statutes, including federal or state statutes consistent with the provisions and purpose of same, and any amendments or successor statutes thereto, any relevant provisions of the Program Operations Manual System maintained by the Social Security Administration, and any case law or other judicial pronouncements or authority relevant to same; and the Trustee shall be fully protected hereunder for the Trustee's good faith reliance on the opinion and direction of such legal counsel; and

(23) Such other uses and purposes as the Trustee may, in the Trustee's discretion, deem appropriate to provide for the Beneficiary under all of the circumstances (including, but not limited to, the provisions and effect of any relevant laws of any jurisdiction which may apply to the Beneficiary from time to time, and the consequences to the Beneficiary of the application of such laws regarding his ongoing eligibility for means-tested benefits or assistance programs for which he may be eligible as a result of his disability), provided that such uses and purposes are for the Beneficiary's benefit.

(c) In exercising the Trustee's sole and absolute discretion regarding distributions of the income and principal of the Trust to, or for the benefit of, the Beneficiary, as set forth in Paragraph (b), above, the Trustee shall consult periodically with the Beneficiary, the Beneficiary's immediate family, the Beneficiary's legal guardian of the person, conservator or other legal representative, if any, as well as any persons designated by the Beneficiary, the Beneficiary's immediate family or his legal guardian of the person, conservator or other legal

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24. Pre-payment prior to the Beneficiary's death is permitted, but POMS SI 01120.203.B.3.b precludes payment for these items postmortem prior to the mandated payback of Medicaid expenditures. Go figure!

25. Medicaid must be reimbursed for medical benefits paid for the Beneficiary prior to establishment of the trust if the d4A trust is funded with a personal injury recovery and the medical care was necessitated by the wrongful acts that generated that recovery. However, Arkansas Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006), holds that this "pre-trust lien" may be satisfied only from that portion of the recovery that is specifically allocable to past medical expenses and costs.

representative, if any, and shall be guided, but not bound, thereby.[26] The Trustee shall also consult directly with any care manager hired by the Trustee, or otherwise working with the Beneficiary to the knowledge of the Trustee, and any persons or institutions involved in implementing a personal life care plan, or similar arrangement, for the Beneficiary to the knowledge of the Trustee, and the Trustee shall be entitled to rely in good faith on any recommendations proffered by such persons or institutions, but shall not be bound thereby. Furthermore, the Trustee may take into account any other resources or support available to the Beneficiary to the knowledge of the Trustee, including any legal obligation of support which any person may owe to the Beneficiary at the time of any distribution from the Trust hereunder, as well as public or private entitlement and assistance programs for which the Beneficiary is, or may be, eligible as a result of his disability, as determined in the sole judgment of the Trustee.[27]

(d) In addition to the permissible discretionary distributions of the income and principal of the Trust, as described in Paragraph (b), above, the Trustee may also make distributions from the income or principal of the Trust, as the Trustee determines, for the purpose of satisfying or otherwise providing for, in whole or in part, the Federal, state and local income, transfer and miscellaneous tax liabilities, and related charges, for which the Beneficiary is, or may be, liable, in such amounts as may be certified by the Beneficiary's tax advisors as constituting the amount which should be distributed from the Trust to satisfy or otherwise provide for, in whole or in part, the valid tax liabilities of the Beneficiary. To the extent practicable, the Trustee shall remit any such distributions directly to the appropriate taxing or other authority in satisfaction of the Beneficiary's said liabilities.[28] The payments authorized by this Paragraph are discretionary, and no claims or rights to payment asserted by any third party may be enforced against this Trust by virtue of such discretionary authority.

(e) In making distributions of the income and principal of the Trust, the Trustee shall, to the extent practicable, make such disbursements directly to the provider of the services or other consideration furnished to, or for the benefit of, the Beneficiary, and the Trustee shall not, to the extent practicable, make distributions directly to the Beneficiary, to his custodian, or to the legal guardian, conservator, or other legal representative, of the Beneficiary, if any, for such services or other consideration furnished by such providers. Provided, however, that if a conservator of the Beneficiary has been appointed and continues to serve, the Trustee may, in the Trustee's

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26. Notice the nimble dance contained in this provision, requiring the trustee to consult ("shall consult" and "shall be guided") but seeking to maintain the distance needed to preclude any suggestion that the Beneficiary or advocates on the Beneficiary's behalf have any right to direct or enforce the trustee's discretion. See annotation 13 regarding this endeavor.

27. The traditional common law presumption is that a trustee may *not* consider other income or resources available to a beneficiary when exercising its discretion to make distributions, the notion being that a beneficiary should not be penalized for being resourceful or productive while a ne'er-do-well beneficiary is favored with larger trust distributions. In this context it is appropriate to preserve trust funds as a safety net resource for the Beneficiary, to guard against other available resources being exhausted before the Beneficiary's death.

28. Direct payment here and in paragraph (e) below is intended to preclude Medicaid authorities from asserting that the Beneficiary is receiving inappropriate and potentially disqualifying distributions. POMS SI 01120.201.F.1, 01120.201.F.2 and 01120.203.B.1.e authorize direct payment to third parties for goods or services for the benefit of the Beneficiary, yet special needs trust drafters in some jurisdictions report that state Medicaid authorities have regarded these provisions as contrary to the "sole benefit" requirement, so those drafters would not include these direct payment provisions. Obviously local practice dictates modification of various provisions, and creates uncertainty about the effect of many aspects of the first-party special needs trust drafting endeavor.

discretion, make such distributions to such conservator within the parameters of such conservatorship. Furthermore, the Trustee may, in the Trustee's sole and absolute discretion, pay directly to the Beneficiary, or to his custodian or legal guardian, conservator or other legal representative, if any, such amounts as the Trustee deems reasonable and proper, in the Trustee's sole and absolute discretion, to provide the Beneficiary with discretionary spending money that will not jeopardize the Beneficiary's eligibility for any benefits that the Beneficiary receives, or would be entitled to receive, as a result of his disabling condition from any public or private entitlement or assistance programs.

(f) Notwithstanding the foregoing provisions of this Trust Agreement governing distributions of the income and principal of the Trust to, or for the benefit of, the Beneficiary, the Trustee shall not be authorized to use any income or principal of the Trust to satisfy, in whole or in part, any legal obligation, of support or otherwise, which any individual may owe to the Beneficiary at the time of such distribution.[29/]

(g) The Trustee shall undertake, or cause to be undertaken, at the expense of the Trust, a comprehensive annual review, or appropriate update, of any public or private entitlement or assistance programs for which the Beneficiary is, or may be, eligible[30/] as a result of his disabling condition, and shall advise the Beneficiary, and his custodian or legal guardian, conservator, or other legal representative, if any, regarding same. The Trustee is authorized, in the Trustee's sole and absolute discretion, to initiate administrative or judicial proceedings, or both, for the purpose of determining the eligibility of the Beneficiary for such programs, but shall not be required to do so. All costs relating thereto, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. The Trustee shall be entitled to rely absolutely on, and shall bear no responsibility for, any determination of a person hired by the Trustee with reasonable care for the purpose of advising the Trustee regarding the availability of any public or private entitlement or assistance programs as a source of support and benefits for the Beneficiary, and the effect of any distribution from the Trust on the Beneficiary's eligibility to receive support and benefits from such sources. The Trustee shall not be responsible for seeking or obtaining such support and benefits for the Beneficiary, but shall cooperate as necessary with the Beneficiary or the Beneficiary's custodian or legal guardian, conservator or

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29. Estate planners use similar language – often known as an Upjohn clause – to preclude the government from asserting a theory that distributions from a trust to an individual to whom the trustee owes a legal obligation of support constitute an indirect benefit to the trustee, because they satisfy or discharge that legal obligation of support. Grantor trust provision §677(b) is a very careful reflection of the reality that distributions from trusts typically do *not* serve to displace or supplant another individual's legal obligation of support, yet the government frequently asserts the "discharge theory" to impute enjoyment or control that it should not. To preclude that theory drafters simply provide that no distribution shall be made that would have the effect of discharging any person's legal obligation of support, knowing that under state law distributions will not have that effect and, therefore, that the clause does not actually hobble the trustee. Here the object is to prevent Medicaid authorities from asserting that the sole benefit requirement has been violated, or that the trust fails as a special needs trust (because, absent this provision, it might be deemed to supplant basic support needs).

30. A trustee may need a review or update from an allied professional (such as a life care planner) to be adequately informed about those government benefits for which a disabled beneficiary may be eligible. It is not, however, the trustee's responsibility to apply for governmental benefits for the Beneficiary. Instead, this typically will be done by the Beneficiary (if competent), a court-appointed guardian or conservator, or the Beneficiary's Representative Payee.

other legal representative, if any, as such persons seek support and benefits for the Beneficiary from any such programs. However, the Trustee shall not be liable to any beneficiary of the Trust, whether primary or contingent, or any other person interested in the Trust, by reason of the failure of such persons to seek or obtain benefits for the Beneficiary from such programs. Any such benefits thus payable to, or for the benefit of, the Beneficiary shall not be commingled with the property of the Trust. Nothing in this Trust Agreement shall be construed to require any such benefits to be added to the Trust.

(h) During the lifetime of the Beneficiary, the Trustee shall not expend any of the property of the Trust for services, benefits, medical or other care, equipment or other property otherwise reasonably available to the Beneficiary from any local, state or federal governments or agencies, or from any private agencies or sources, or from any private insurance carrier required to cover the Beneficiary, as determined in the sole judgment of the Trustee. If such benefits are not reasonably available to the Beneficiary, as determined in the sole judgment of the Trustee, taking into consideration (i) the actions which have been, or could reasonably be, taken by the Beneficiary, or the Beneficiary's legal guardian, conservator or other legal representative, if any, to seek such benefits from such sources, (ii) the success, or likely success, of such actions, and the time frame therefor, (iii) the expense, or likely expense, of such actions, relative to the benefits secured, or likely to be secured, by such actions, (iv) the relative value to the Beneficiary of a possible reduction in such benefits ensuing from the use of the property of the trust for any of the purposes set forth herein, and (v) the effect of any financial limitations with respect to eligibility for such benefits on the Beneficiary's ability to engage in income-producing activity that he would otherwise be capable of, and inclined to pursue, and the relative overall effect of any such earned income on the Beneficiary considering all of the circumstances, then the Trustee may, in the Trustee's sole and absolute discretion, expend the property of the Trust for the purposes set forth in this Item, and shall not be liable to any beneficiary of the Trust, whether primary or contingent, or any other person interested in the Trust, for such expenditures of Trust property. During the lifetime of the Beneficiary, the Trustee shall deny any request by any public or private entity to disburse the property of the Trust for support, services, benefits, medical or other care, equipment or other property that such entity has the obligation to provide to the Beneficiary, as determined in the sole judgment of the Trustee. During the lifetime of the Beneficiary, the Trustee shall similarly deny any request by any public or private entity administering such benefits to petition a court or any other administrative body for the release of Trust property for such purpose. All costs relating to such denials by the Trustee, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust.[31] However, the Trustee shall not be liable to any beneficiary of the Trust, whether primary or contingent, or any other person interested in the Trust, by reason of any failure to comply fully with the provisions of this Paragraph, unless such failure was due to the bad faith or willful misconduct of the Trustee.

(i) Upon the death of the Beneficiary, the Trustee shall satisfy any valid claims for reimbursement of medical assistance benefits paid on behalf of the Beneficiary during his lifetime which the Trust is legally required and obligated to satisfy pursuant to 42 U.S.C. Section 1396p(d)(4)(A), and any regulations promulgated thereunder, or any related statutes, including federal or state statutes consistent therewith, and any amendments or successor statutes thereto, and any case law or other judicial pronouncements or authority relevant to same. If the property then remaining in the Trust is insufficient to satisfy all such reimbursement claims of equal

31. First-party special needs trusts may direct the trustee to affirmatively oppose a request for disbursements, including through litigation, and (similar to this provision) provide the funds needed and indemnify the trustee for honoring that provision.

priority, then the Trustee shall satisfy such claims on a *pro rata* basis.[32] The Trustee shall not be liable to any person for any partially or fully unsatisfied claims to the extent that there is insufficient property remaining in the Trust to fully satisfy all such claims. The Trustee shall be authorized, in the Trustee's sole and absolute discretion, to initiate administrative or judicial proceedings, or both, for the purpose of determining the validity or priority of any reimbursement claims presented to the Trustee for satisfaction in accordance with this Paragraph, or to determine that no such claims exist. All costs relating thereto, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. Notwithstanding the foregoing provisions of this Paragraph, if and to the extent the Trustee, in the Trustee's sole and absolute discretion, declines to challenge, in whole or in part, any alleged claim against the Trust for reimbursement of medical assistance benefits paid on behalf of the Beneficiary during his lifetime, then the personal representative of the Beneficiary's Estate (or its designees)[33] may initiate appropriate administrative or judicial proceedings, or both, for the purpose of determining the validity or priority of any such alleged claim. All costs relating thereto, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. The Trustee shall be entitled to rely absolutely on any final administrative or judicial determination of the validity of any such alleged claim against the Trust. The satisfaction, or other resolution, by the Trustee of any reimbursement claims hereunder shall be final and binding on all persons interested in this Trust, and the Trustee shall be relieved of any and all liability for the discharge of the Trustee's duties hereunder, unless done in bad faith.

(j) If there is any property of the Trust remaining after the reimbursement claims described in Paragraph (i), above, have been satisfied or otherwise provided for, if required, the Trustee shall withhold from the remaining property of the Trust an amount of property sufficient in its judgment to satisfy, or otherwise provide for, in whole or in part (in the Trustee's sole discretion), any transfer, estate, inheritance, succession or other death taxes which shall become payable by reason of the Beneficiary's death with respect to the property of the Trust, as well as any and all debts and expenses of administration of the Beneficiary's estate (including, but not limited to, the expenses of the Beneficiary's last illness and funeral if, in the determination of the Trustee, other satisfactory provisions have not been made for payment of same), and to distribute to the Beneficiary's personal representative such amount as may be certified by such personal representative as constituting the amount which should be distributed from the Trust to satisfy or otherwise provide for, in whole or in part, such valid tax liabilities, debts and expenses of the Beneficiary.[34] The Trustee shall not be liable to any person for any partially or fully unsatisfied

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32. A beneficiary may have received medical assistance under more than one state's Medicaid program, in which case the trustee must determine how to allocate any remaining funds between those states. Because the trustee is liable for making incorrect payback disbursements, the drafter may authorize the trustee to sequester the remaining funds and require the claimants to obtain a court order that resolves the order or amount of disbursements to be made to each.

33. This provision authorizes the Beneficiary's personal representative because the remainder interest passes to the Beneficiary's probate estate under paragraph (k)(1) below. That disposition is not required, and another remainder disposition may be more appropriate, especially if the Beneficiary has the mental capacity to provide meaningful input, in which case this provision also might be altered. If such a case, if distribution to the Beneficiary's estate is regarded as preferable, then the document might authorize the trustee to seek appointment of a personal representative if none currently is acting.

34. The drafter of this trust should ensure that the Beneficiary's will contains a provision that is consistent with this certification provision. If the remainder is payable to the Beneficiary's

taxes, debts or expenses of administration, as aforesaid, to the extent that there is insufficient property remaining in the Trust to fully satisfy all such items. The payments authorized by this Paragraph are discretionary,[35] and no claims or rights to payment asserted by any third party may be enforced against the Trust by virtue of such discretionary authority.

(k) If there is any property of the Trust remaining after the items described in Paragraph (j), above, have been satisfied, or otherwise provided for, such remaining Trust property shall be distributed by the Trustee as follows:

(1) Ten Dollars shall be distributed to the Beneficiary's parents, JOHN ALBERT SMITH and MARY CLINE SMITH, or all to the survivor of them if only one of them is then living.[36]

(2) The balance of the property which remains in the Trust after any distribution in accordance with Subparagraph (1), above, shall be distributed to such persons, and in such manner, as the Beneficiary may direct or appoint by his Last Will and Testament duly admitted to probate, making specific reference to this power. To the extent the Beneficiary does not effectively exercise this power of appointment,[37] any such property remaining in the Trust shall be distributed to the personal representative of the Beneficiary's estate or, if there is no personal representative, directly to (i) the persons who would be entitled thereto if the Beneficiary's Last Will and Testament was duly probated, if any, or (ii) to the persons entitled thereto under the relevant laws of descent and distribution, if the Beneficiary has died intestate, thus terminating this Trust.[38] The

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estate, then certification for payment from the trust probably is not necessary, as the estate will receive the requisite funds from the trust in any event.

35. This trust will be includible in the Beneficiary's gross estate for federal estate tax purposes under §2036(a)(1) because the Beneficiary is the functional transferor of the trust corpus and has retained a life estate. Under §2207B the Beneficiary's estate is entitled to reimbursement of any estate tax attributable to that inclusion, which right of reimbursement may be waived by this trust or by a provision in the Beneficiary's will, but only if the waiver makes specific reference to the right of reimbursement. This provision is inadequate for that purpose, which likely frustrates the intent of the Beneficiary, who presumably would prefer to preserve estate assets for natural objects of the Beneficiary's bounty, and cause this trust to pay estate tax prior to satisfying the Medicaid payback reimbursement.

36. This provision is reminiscent of the language routinely included in an estate plan to preclude any claim by an otherwise "pretermitted heir" but here it is inserted to preclude the state Medicaid authorities from making the kinds of arguments identified in the text accompanying annotation 6.

37. The following provision may be useful in determining whether the Beneficiary effectively exercised the power:

> In disposing of any trust property subject to the Beneficiary's power to appoint by will, the Trustee may rely upon an instrument admitted to probate in any jurisdiction as the will of the Beneficiary or may assume that the power was not exercised if the Trustee has no actual notice within three months of the Beneficiary's death of a will that exercises the power. The Trustee may rely on any document or other evidence in making payment under this trust and shall not be liable for any payment made in good faith before the Trustee receives actual notice of a changed situation.

38. A trustee may prefer to distribute remaining trust property to the personal representative, and thus avoid being responsible to determine the estate beneficiaries or the Beneficiary's heirs. Nevertheless, distribution to the Beneficiary's estate is not recommended because the Social Security Administration in some regions of the country asserts that payment to the

Trustee shall not be liable to any person named or described in this Trust Agreement, or otherwise interested in this Trust, for the amount of property remaining in the Trust, if any, after the items described in Paragraphs (i) and (j) of this Item have been satisfied, or otherwise provided for, in whole or in part, in the sole discretion of the Trustee.

(l) For so long as required by any relevant state Medicaid program(s), or by the Social Security Administration, or by any of their delegates or their successors-in-interest, the Trustee shall give written notice to same within five days of the death of the Beneficiary.

ITEM V: PROVISIONS CONCERNING TRUSTEE

(a) The Settlor hereby constitutes and appoints RELIABLE BANK & TRUST, N.A. (or any bank or trust company into which it may hereafter be merged or consolidated) as the initial Trustee of the Trust. Under no circumstances shall the Beneficiary serve as Trustee of the Trust.[39]

(b) RELIABLE BANK & TRUST, N.A., as well as any successor corporate fiduciary serving hereunder, shall receive as compensation for its services as Trustee hereunder the fees it normally charges to similar trusts under its regularly published fee schedule as the same may, from time to time, be amended, unless specifically negotiated otherwise in writing. The Trustee is authorized to engage the services of any of its affiliated entities, without reduction of any other fees or compensation paid to the Trustee or to any other corporation, partnership or other entity affiliated with the Trustee (an "Affiliated Entity"), including, but not limited to, such fees or compensation paid by any mutual fund, unit investment trust or other investment vehicle. The Trustee may use the services of an Affiliated Entity for such purposes as it deems necessary or advisable, including, but not limited to, management or advice with respect to investments, acting as broker or dealer to execute transactions and purchasing any securities written or issued by an Affiliated Entity, even though the costs associated with a particular service rendered by an Affiliated Entity may not be the lowest available.[40] The compensation of the Trustee hereunder may be paid without court approval.

(c) Any Trustee serving hereunder may at any time resign by instrument in writing signed by such Trustee and delivered to any other Trustee then serving, and to the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any. Within sixty days of receiving written notice of the intention of a Trustee to resign hereunder, the Beneficiary's legal guardian, conservator or other legal representative, if any, and if none, his custodian, as the case may be,[41] shall designate a qualified successor Trustee by instrument in writing delivered to the

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Beneficiary's estate means the trust is revocable, which is contrary to the requirement noted in annotation 5.

39. The Beneficiary may be fully capable to serve, but being in control of discretionary distributions to the Beneficiary would cause the trust to be regarded as a countable resource and destroy the primary purpose for the trust.

40. This provision is not required at all in a third-party special needs trust. It exists in this first-party trust for two reasons. One is because some corporate fiduciaries request such protection. The other is to avoid any concern about improper self-dealing being an impediment to qualification of this d4A special needs trust.

41. If the Beneficiary is fully capable, then there may be none of these actors involved, in which case the Beneficiary could designate the qualified successor trustee. That control will not disqualify the trust or cause it to be a countable resource.

resigning Trustee. Any such successor Trustee shall be a bank or trust company[42] that is ready, willing and able to serve in such capacity and either (i) has at least $200 million in trust assets under management, or (ii) is obligated by law, or obligates itself, to post and maintain a fidelity or fiduciary bond sufficient to insure fully the value of the Trust property, at the expense of the successor Trustee. Any entity designated to succeed a resigning Trustee, as provided for herein, shall first execute a formal, written acceptance of the duties and obligations of the resigning Trustee, and file an executed copy of such acceptance with the resigning Trustee and with the Beneficiary, and the Beneficiary's custodian, legal guardian, conservator or other legal representative, as the case may be. Prior to delivering or releasing any part of the property of the Trust to a successor Trustee, a resigning Trustee may require an approval of its activities during its term of service as Trustee, in a form acceptable to the resigning Trustee, including, but not limited to, by order of a court of competent jurisdiction.[43] The resigning Trustee shall transfer all property of the Trust then in its hands to the successor Trustee, and such resigning Trustee shall thereupon and thereby be discharged of all further duties and obligations under or arising out of such fiduciary capacity.

(d)

(i) The Beneficiary's legal guardian, conservator or other legal representative, if any, shall have the right to remove any corporate Trustee serving hereunder[44] for reasonable cause (as defined hereinafter), and to substitute in lieu thereof a new corporate Trustee which is ready, willing and able to serve in such capacity and either (A) has at least $200 million in trust assets under management, or (B) is obligated by law, or obligates itself, to post and maintain a fidelity or fiduciary bond sufficient to insure fully the value of the Trust property, at the expense of the successor Trustee. As used in this Paragraph, the term "reasonable cause" includes,[45] but is not limited to, (1) the willful or negligent

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42. There is no requirement that the trustee be a corporate fiduciary. This is a matter of personal preference.

43. The trustee need not go to court if it is comfortable with approval from beneficiaries of the trust or their personal representatives, but it may seek a court order if individual approvals are not regarded as adequate protection.

44. Again, there is no requirement that the trustee be a corporate fiduciary. This is a matter of personal preference. As a practical matter, if the trustee is an individual the power to remove and replace is likely *more* important than if the trustee is a professional, because individual trustees typically have no track record that allows for an accurate prediction of how they will perform. If expectations are defeated with an individual who is incapable (or worse), it is every bit as important to be able to remove and replace that individual as it might be to change a corporate trustee for the sorts of causes noted in this provision.

45. In the context of retained powers over a trustee the Internal Revenue Service issued Private Letter Rulings 9303018 and 9328015 to bless the following list of reasons for removal as not providing the settlor with unreasonable control. Those PLRs addressed concerns under the Internal Revenue Code, but the list is very similar to that in this document and either may provide a reasonable template for drafting in the SNT context.

> Removal of a trustee for cause shall mean any one of the following: 1. The legal incapacity of a trustee. 2. The willful or negligent mismanagement by the trustee of the trust's assets. 3. The abuse or abandonment of, or inattention to, the trust by the trustee. 4. A federal or state charge against the trustee involving the commission of a felony or serious misdemeanor. 5. An act of stealing, dishonesty, fraud, embezzlement, moral turpitude, or moral degeneration by the trustee. 6. The use of narcotics or excessive use of alcohol by the trustee. 7. The poor health of the trustee such that the trustee is physically, mentally, or emotionally unable to devote sufficient

mismanagement by the Trustee of the Trust assets; (2) the abuse or abandonment of, or inattention to, the Trust by the Trustee; (3) a federal or state charge against the Trustee involving the commission of a felony or serious misdemeanor; (4) an act of stealing, dishonesty, fraud or embezzlement by the Trustee; (5) the failure by the Trustee to comply with a written fee agreement or other written agreement in the operation of the Trust; (6) changes by the Trustee of the account officer responsible for handling the Trust account more frequently than every two years, unless such change is made at the request of the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any; (7) inaccurate or unclear transaction or account statements with respect to the property of the Trust; (8) the failure of the Trustee to consult with the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any (or persons designated by same), regarding the administration of the Trust, as required in this Trust Agreement; (9) the existence of an objectively unacceptable fiduciary relationship between or among the Trustee and the Beneficiary, and the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any, including, but not limited to, a documented lack of cooperation by the Trustee in responding to inquiries pertaining to the administration of the Trust, a documented failure of the Trustee to communicate and explain the grounds for any determination by the Trustee regarding the disbursement or investment of Trust property, or the general unavailability of Trustee personnel (or the delegates or agents of such personnel) able to communicate effectively with the Beneficiary, the Beneficiary's custodian, and legal guardian, conservator or other legal representative, if any, with regard to the affairs of the Trust; (10) the fee schedule which applies to the Trust is objectively uneconomical when compared to the applicable fee schedule of other potential successor corporate Trustees which would be ready and willing to accept the trusteeship of the Trust (within the parameters of Item V of this Agreement); and (11) any other reason for which a court of competent jurisdiction would remove a Trustee. Such right of removal shall be exercised by written instrument delivered to the Trustee so removed and appointed, but such removal shall not be effective unless and until the Trustee designated to succeed the Trustee so removed has first executed a formal, written acceptance of the duties and obligations of the removed Trustee, and filed an executed copy of such acceptance with the removed Trustee and with the Beneficiary, the Beneficiary's custodian, and legal guardian, conservator or other legal representative, if any.

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time to administer the trust. 8. The failure by the trustee to comply with a written fee agreement or other written agreement in the operation of the trust. 9. The failure of a corporate trustee to appoint a senior officer with at least five years of experience in the administration of trusts to handle the trust account. 10. Changes by a corporate trustee in the account officer responsible for handling the trust account more frequently than every five years (unless such change is made at the request of or with the acquiescence of the Beneficiary). 11. The relocation by a trustee away from the location where the trust operates so as to interfere with the administration of the trust. 12. A demand from the trustee for unreasonable compensation for such trustee's services. 13. Any other reason for which a [state] court of competent jurisdiction would remove a trustee.

The major differences between this list and that in subparagraph (d)(i) are Items 7 through 10 of the latter. All but Item 10 are included in Item 11 in text (Item 13 in the list in this annotation) and merely constitute an elaboration that may be useful. Item 10 in text may require special consideration, in terms of whether it is appropriate to allow removal and replacement of a trustee that was purposefully selected simply because there is a cheaper available option.

(ii) Notwithstanding the foregoing provisions of Subparagraph (i), above, the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any,[46] shall have the right to petition any court then having jurisdiction over the Beneficiary,[47] or any other court of competent jurisdiction, to remove the Trustee then serving and to substitute in lieu thereof a successor Trustee, upon such terms as the Court deems to be in the best interests of the Beneficiary, with due regard for the effect of any proposed removal on the administration of the Trust. The costs of such proceeding, including the reasonable attorneys' fees of the Trustee and the Beneficiary or the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any, in connection therewith, shall be paid from the Trust only as directed by order of the relevant court. If the said court fails or refuses to accept jurisdiction of any such petition to remove the Trustee, then the foregoing provisions of Subparagraph (i), above, shall be and remain the sole means by which the Trustee may be removed and replaced.

(iii) Prior to delivering or releasing any part of the property of the Trust to a successor Trustee, a removed Trustee may require an approval of its activities during its term of service as Trustee, in a form acceptable to the removed Trustee, including, but not limited to, by order of a court of competent jurisdiction. The costs of any such accounting or approval, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust only if approved by order of a court of competent jurisdiction. The removed Trustee shall transfer all property of the Trust then in its hands to the designated successor Trustee, and such removed Trustee shall thereupon and thereby be discharged of all further duties and obligations under or arising out of such fiduciary capacity.[48]

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46. If the Beneficiary is fully capable, then there may be none of these actors involved, in which case the Beneficiary could petition instead. That control will not disqualify the trust or cause it to be a countable resource.

47. Depending on the jurisdiction, this reference may be inappropriate and instead should merely mimic that in (iii) below, which simply refers to "a court of competent jurisdiction."

48. At the insistence of a corporate trustee the following added provision has been used in a situation involving enough wealth that the 10% escrow account was deemed adequate. In other cases it would not suffice to protect the trustee and, in any event, the first clause of this item (iii) ought to suffice to protect a trustee that is being removed.

    If the aforesaid approval of the activities of the removed Trustee is not, or cannot reasonably be, obtained, then the removed Trustee shall instead deliver or release ninety percent (90%) of the property of the Trust to the designated successor Trustee to be managed in accordance with this Trust Agreement, and shall deliver or release ten percent (10%) of such property to the designated successor Trustee to be held in a separate escrow account. The said escrow account shall also be managed by the designated successor Trustee in accordance with this Trust Agreement, but the property in such account shall be subject to any court-approved claims by the removed Trustee for reimbursement of the costs of defending any claims or actions against it for its activities during its term of service as Trustee, in such amount as determined and allowed by a court of competent jurisdiction. The escrow account shall be maintained until the later of (A) the issuance of a court order regarding the amount, if any, for which the removed Trustee may be reimbursed for such costs, or (B) the expiration of the relevant statute of limitations for any such claims against the removed Trustee, at which time the balance then remaining in the escrow account (after the reimbursement, if any, of the removed Trustee, as aforesaid) shall be added to the other property of the Trust being managed by the designated successor Trustee, unless the said court order otherwise provides, and the removed Trustee shall thereupon and thereby be

(e) If for any reason no successor trustee is willing and able to act,[49] notwithstanding the foregoing provisions of this Item, then a successor Trustee shall be appointed by any court then having jurisdiction over the Trust, upon application of any person interested in the Trust, upon such terms and conditions as the court may order.

(f) Any successor Trustee shall have and may exercise any and all of the powers, privileges, immunities and exemptions herein conferred on the initial Trustee as fully and to the same extent as if such successor Trustee had originally been named as a Trustee herein. No successor Trustee shall be required to inquire into or audit the acts or doings of any predecessor Trustee.

(g) Except as otherwise required by the regulations or rules of any relevant state Medicaid program for which the Beneficiary is eligible and is, in fact, receiving benefits, no Trustee shall be required to file any inventory or appraisal, or any annual or other returns or reports, with any court, or to give bond, but shall keep full books of account showing the condition of the Trust, which shall be open at reasonable times for inspection by the Settlor (or his designees), the Beneficiary, and the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any, and shall furnish a statement of receipts and disbursements at least annually to such persons. Notwithstanding the foregoing provisions of this Paragraph, for so long as required by any relevant state Medicaid program(s), or by the Social Security Administration, or by any of their delegates or their successors-in-interest, the Trustee shall maintain a current schedule of all assets of the Trust, all assets purchased with Trust funds, and all wages or payments for caregiver or other services funded by the Trust, and shall provide an annual update of such schedules to same.

(h) For so long as required by any relevant state Medicaid program(s), or by the Social Security Administration, or by any of their delegates or their successors-in-interest, the Trustee shall give a minimum of thirty days written notice if there is a change in the Trustee of the Trust.

ITEM VI: INVESTMENT ADVISOR[50]

Any Trustee serving hereunder may appoint any person or persons (individual or corporate) to serve as an investment advisor to the Trustee (the "Investment Advisor"), upon such terms and conditions as the Trustee may agree upon in writing with such Investment Advisor. In the absence of any such terms and conditions to the contrary, the Settlor suggests that the following

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discharged of all further duties and obligations under or arising out of such fiduciary capacity.

49. One of the most difficult aspects of trust design and administration is providing for trustee succession. At some point the list of designated fiduciaries may be exhausted, but black letter law specifies that the trust will not fail for the lack of a trustee unless only particular trustees are allowable. If not, the key to effective administration is to provide a viable means for selection of successors that will stand the test of time. This trust will not exist for multiple generations, so the challenge here is less difficult than in a perpetual dynasty trust. Common options for the selection include delegation to the local court with jurisdiction over the trust administration, or reliance on some other body or person (such as a trust advisor or protector, which just pushes the issue down to selection of *their* successors), or the presiding judge of a local court or perhaps the lead lawyer in whatever amounts to the successor of the drafter's law firm.

50. This provision is not required in any special needs trust, and the trust may not need an independent investment advisor – especially if the trustee is a professional or corporate fiduciary.

terms and conditions should govern the delegation of investment authority contemplated hereunder.

(a) The administrative and custodial functions of the Trust shall be the sole responsibility of the Trustee.[51] If the Investment Advisor is selected and monitored by the Trustee with reasonable care, the Trustee shall have no responsibility or liability for the decisions of the Investment Advisor regarding the purchase, sale, retention, or management of the investments of the Trust. Subject to the acceptance of said investment responsibilities, the investment functions of the Trust shall be the sole responsibility of the Investment Advisor, including, but not limited to, the duties and responsibilities set forth in Item VII, Paragraphs (a)(1), (a)(2), (a)(3), (a)(9), and (g), below, incorporated herein by this reference (and, for this purpose, the references therein to "the Trustee" shall be deemed to be replaced with references to "the Investment Advisor"), for so long as an Investment Advisor is serving hereunder.

(b) The Investment Advisor shall have the duty and responsibility to review and manage all Trust assets, which shall collectively be referred to in this Item as the "Trust Estate." In its fulfillment of this duty and responsibility the Investment Advisor, in said Investment Advisor's sole discretion, may designate third-party investment manager(s) to review and manage part or all of the Trust Estate, as the Investment Advisor may determine from time to time. The Investment Advisor, or its designee, as the case may be, shall direct the Trustee in all matters involving the retention and disposition of the investments deposited to the Trust Estate, as well as the retention, subsequent investment, reinvestment, exchange, and tender of, and all other transactions related to, the ownership and management of all manner of securities, and all variety of real and personal property which shall comprise the Trust Estate.

(c) In consideration for the services of the Investment Advisor, and in addition to reimbursement of reasonable expenses incurred by the Investment Advisor in the performance of its duties with respect to the assets of the Trust Estate, the Investment Advisor shall receive compensation, separate and apart from the compensation of the Trustee, for its services rendered to the Trust Estate, all in accordance with its published schedule of fees as may be in effect from time to time, or as otherwise agreed with the Trustee. The Trustee shall not be required to negotiate a compensation arrangement with the Investment Advisor that produces a best execution price. As a result, the Investment Advisor may receive commissions on purchases or sales of securities and mutual funds, and loads may be paid on the purchase of mutual funds in the Trust. The compensation and other expenses of the Trustee and Investment Advisor may be charged, in the Trustee's discretion, to either income or principal, and may be paid without court approval. In accepting the appointment as Trustee or Investment Advisor of the trusts created herein, each such Trustee or Investment Advisor agrees to accept the foregoing provisions governing appointment and removal, and agrees that, upon termination of the Trust or upon a change of Trustee or Investment Advisor, it will not impose a severance, succession or termination charge by reason of the discontinuance of its services as Trustee or Investment Advisor.

(d) The Trustee shall be fully indemnified from the Trust Estate and held harmless against liability for any and all claims, losses, damages, demands, causes of action, fines, taxes, costs and expenses sustained or incurred by the Trustee or resulting to the Trust Estate, or to any current or future beneficiary thereof, by reason of any purchase, sale, action or inaction of the Investment Advisor or the Trustee's reliance thereon, except for gross negligence or fraud, it

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51. In appropriate circumstances the trustee need not be denied the power to delegate functions such as accounting and custody of assets. The point here is that they need not be delegated to the investment advisor.

being the intention of the Settlor to relieve and release the Trustee of every duty and responsibility involving the ownership, management, or other investment-related action taken pursuant to, and in accordance with, the direction of the Investment Advisor, or by reason of the failure of the Trustee to take any action in the absence of direction from the Investment Advisor regarding any security or asset which comprises the Trust Estate. Such indemnification extends to, but is not limited to, the Trustee's costs of defending against claims and legal actions, including court costs and reasonable attorneys' fees.

(e) The Investment Advisor shall have the right at any time to resign as such by written notice of its intention to resign delivered to the Trustee, the Settlor, and to the Beneficiary (or to the Beneficiary's legal guardian, conservator or other legal representative, if any). The Trustee shall have the right to remove the Investment Advisor, for any reason or for no reason whatsoever, without penalty, termination fee or other charge upon such removal, at any time, and from time to time, by giving written notice of removal to the Investment Advisor. The person or persons (individual or corporate) designated by the Trustee to succeed the Investment Advisor so removed (or resigned, as the case may be), shall execute a formal written acceptance of the duties and obligations of the former Investment Advisor, and shall file an executed copy of such acceptance with the former Investment Advisor and with the Trustee, the Settlor, the Beneficiary (or the Beneficiary's custodian, legal guardian, conservator or other legal representative, if any). The former Investment Advisor shall transfer to the successor Investment Advisor all of the Trust Estate then in its hands, and such former Investment Advisor shall thereupon be discharged of any and all further duties and obligations under, or arising out of, such service. The costs attendant to any removal of the Investment Advisor hereunder, including the reasonable attorneys' fees of the persons exercising the right of removal, if any, shall be a proper expense of the Trust, unless ordered otherwise by a court of competent jurisdiction.

(f) Any Investment Advisor hereunder must be: (i) an investment partnership, where the general partner of such partnership is an individual or entity with assets under management, on a discretionary basis, either as a fiduciary or investment advisor, exceeding Fifty Million Dollars ($50,000,000) at the time of the investment, (ii) a mutual fund, where the sponsor of such fund is an individual or entity with combined assets under management, on a discretionary basis, either as a fiduciary or investment advisor, exceeding Fifty Million Dollars ($50,000,000) at the time of the investment, (iii) an individual or entity with assets under management, on a discretionary basis, either as a fiduciary or investment advisor, exceeding Fifty Million Dollars ($50,000,000) at the time of the investment, or (iv) an individual or entity who, although not managing, on a discretionary basis, combined assets exceeding Fifty Million Dollars ($50,000,000), invests the entire account in a manner described in (i), (ii) or (iii) above, or any combination thereof.

ITEM VII: POWERS OF TRUSTEE

(a) Except as otherwise specifically provided herein, in the management, care and disposition of every trust created hereunder, the Settlor confers upon the Trustee, and any successors in office, in addition to those powers set out in other Items of this Trust Agreement, the power to do all things and execute such instruments as may be deemed necessary or proper and as may be incident to such office, including the following powers, all of which may be exercised without order of, or report to, any court:

(1) To sell, exchange or otherwise dispose of any property at any time held or acquired hereunder, at public or private sale, for cash or on terms, without advertisement;

(2) To invest and reinvest all monies in such stocks, bonds, securities, investment company or trust shares (including investments in investment companies or trusts and in collective or commingled investment funds offered by or through any corporate Trustee

or any Affiliated Entity), mortgages, notes, choses in action, real estate, improvements thereon and other property as the Trustee may deem best, regardless of the fact that a security is purchased from an underwriting syndicate that includes any corporate Trustee or an Affiliated Entity of any corporate Trustee as a member, or that the security was underwritten by such a syndicate and is purchased from a member of that syndicate; provided, however, that the Trustee shall in all events invest and reinvest the property of the Trust as would prudent persons of discretion and intelligence who are seeking a reasonable income and the preservation of their capital, any provision of this Trust Agreement to the contrary notwithstanding;

(3) To retain for investment any property or choses in action deposited with the Trustee, including any stock in any corporate Trustee or in a parent or Affiliated Entity of the Trustee or in a company whose stock the Trustee or an Affiliated Entity holds as an asset, either individually or in a fiduciary capacity;

(4) To vote in person or by proxy any corporate stock or other security and to agree to or take any other action in regard to any reorganization, merger, consolidation, liquidation, bankruptcy or other procedure or proceeding affecting any stock, bond, note or other property;

(5) To retain and employ real estate, business and other brokers, investment advisors, lawyers, accountants, medical claims administrators, third-party administrators, and other agents, if such employment be deemed necessary, and to pay reasonable compensation for their services from the property of the Trust, including, but not limited to, the services of health care management providers to implement or facilitate any of the purposes described in Item IV, Paragraph (b), above, or to perform any of the duties otherwise ascribed to the Trustee in the said Item IV, as the Trustee reasonably determines to be within the expertise of such providers, and the Trustee shall be entitled to rely absolutely on, and shall bear no responsibility for, any determination or action of any such providers, hired by the Trustee with reasonable care for such purposes;

(6) To compromise, settle or adjust any claim or demand by or against the Trust and to agree to any rescission or modification of any contract or agreement affecting the Trust;

(7) To renew any indebtedness, as well as to borrow money, and to secure the same by mortgaging, pledging and conveying any property of the Trust, including the power to borrow from the Trustee or any Affiliated Entity of the Trustee at a reasonable rate of interest;

(8) To retain and carry on any business in which the Trust may acquire an interest, to acquire additional interest in any such business, to agree to the liquidation in kind of any corporation in which the Trust may have any interest and to carry on the business thereof, to join with other owners in adopting any form of management for any business or property in which the Trust may have an interest, to become or remain a partner, general or limited, in regard to any such business or property, to incorporate any such business or property and to hold the stock or other securities as an investment, and to employ agents and confer on them authority to manage and operate such business, property or corporation, without liability for the acts of any such agents or for any loss, liability or indebtedness of such business if the management is selected or retained with reasonable care;

(9) To register any stock, bond or other security in the name of a nominee, and use nationally recognized depositories, without the addition of words indicating that such security is held in a fiduciary capacity; but accurate records shall be maintained showing

that such security is a trust asset and the Trustee shall be responsible for the acts of such nominee:

(10) To pay from the Trust all charges which the Trustee deems necessary or appropriate to comply with laws regulating environmental conditions and to remedy or ameliorate any such conditions which adversely affect the Trust, and to pay any liabilities, fines or penalties incurred by the Trustee personally on account of such conditions, other than any such charges that are directly caused by the Trustee's own gross negligence or willful misconduct, and to apportion all of such charges in such manner as the Trustee deems fair, prudent and equitable under all of the circumstances;

(11) To engage the services, as a reasonable expense of the trust, of architects or other professionals with appropriate expertise in the area of home modification, design or construction, general or specific contracting, for any home construction or modification for the benefit of the Beneficiary, and to rely absolutely on, and bear no liability for, any professional advice, construction plans, and timeliness of completion or workmanship of any home modification or construction project provided by same; and

(12) To receive additions to the Trust prior to the Beneficiary's sixty-fifth birthday,[52] and to hold and administer the same under the provisions hereof.

(b) Notwithstanding the broad discretion and powers granted to the Trustee and the Investment Advisor in this Trust Agreement, the Trustee and the Investment Advisor shall, to the extent practicable, consult regularly with the Settlor, the Beneficiary, the Beneficiary's immediate family, and the Beneficiary's legal guardian, conservator, or other legal representative, if any, regarding the investment of the property of the Trust, and shall be guided, but not bound, thereby.[53]

(c) In making distributions from any trust created hereunder to or for the benefit of any minor or other person under a legal disability (other than the Beneficiary), the Trustee need not require the appointment of a guardian or conservator for such person, but may pay or deliver the same to the custodian of such person, including a custodian under the Transfers to Minors Act, or similar statute, of any jurisdiction, may pay or deliver the same to such person without the intervention of a guardian or conservator, may pay or deliver the same to a legal guardian, conservator or other legal representative, of such person if one has already been appointed or may use the same for the benefit of such person.[54]

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52. 42 U.S.C. §1396p(d)(4)(A) requires creation of a first-party special needs trust prior to the Beneficiary's age 65. The legislative history does not reveal why the age 65 requirement was imposed. Under POMS SI 01120.203.B.1.b, a qualifying trust retains its exempt status after the Beneficiary attains age 65. But POMS SI 01120.203.B.1.c allows addition after the Beneficiary's age 65 of only (i) interest, dividends, or other earnings on trust property, and (ii) annuity or support payments that were irrevocably assigned to the trust, in each case before the Beneficiary's age 65. Any other additions to the trust after the Beneficiary's age 65 count against the Beneficiary as impermissible "income" (in the month they were added to the trust) or "resources" (in subsequent months).

53. This consultation provision is not required in a special needs trust.

54. The parenthetical excluding the Beneficiary is required because payment to third parties on the Beneficiary's behalf would violate the sole-benefit requirement in POMS SI 01120.201.F.2 and 01120.203.B.1. Distributions to others occur only after the Beneficiary's death, meaning that this facility-of-payment provision only applies to distributions to the remainder beneficiaries.

(d) In the administration of the Trust, the Trustee shall be authorized to make distributions in money or in kind or in both, regardless of the basis for income tax purposes of any property distributed in kind, and the distribution and division made and the values established by the Trustee shall be binding and conclusive on all persons taking hereunder.

(e) The Trustee shall determine whether items should be charged or credited to income or principal or allocated between income and principal in accordance with the laws of the State wherein the Trust has its situs.

(f) Unless otherwise expressly directed hereunder, the Trustee may make any election or allocation permitted by any tax law, if in the opinion of the Trustee such election is for the combined best interest of the Trust and the beneficiaries thereof, and shall apportion taxes and adjustments between the parties or the several accounts in accordance with the laws of the State wherein the Trust has its situs.[55]

(g) The Trustee shall have the following additional specific powers as to Trust property and may exercise the same in its sole and absolute discretion without court order or approval:[56]

(1) To engage any Affiliated Entity to render services to any Trust hereunder, including, without limitation:

(i) To manage or advise on the investments of the Trust on a discretionary or nondiscretionary basis.

(ii) To act as a broker or dealer to execute transactions, including the purchase of any securities currently distributed, underwritten or issued by an Affiliated Entity, at standard commission rates, markups or concessions, and to provide other management or investment services with respect to the Trust, including the custody of assets, and to pay for any such services from Trust property, with appropriate reduction in the compensation paid to the Trustee for its services as Trustee, unless otherwise agreed in writing between the Trustee and the Settlor, the Beneficiary's legal guardian, conservator or other legal representative, if any.

(2) To invest in mutual funds offered by an Affiliated Entity or to which an Affiliated Entity may render services and from which an Affiliated Entity receives compensation.

(3) To cause or permit all or any part of any Trust hereunder to be held, maintained or managed in any jurisdiction, and to hold any Trust property in the name of its nominee or a nominee of any Affiliated Entity.

(h) The Trustee shall not be deemed to have accepted title to, and shall not act or be obligated to act in any way as a fiduciary with respect to, any real property, including any real

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55. Note that decanting of the trust is not mentioned in this trust, notwithstanding that decanting may be appropriate for state income tax minimization, because the Beneficiary has changed domicile, or for other trust administration purposes. Decanting of the trust will not alter the jurisdiction that has authority over the Medicaid qualification of the trust, which instead is based on the Beneficiary's domicile.

One concern expressed by some special needs trust drafters is that decanting might be regarded as an end run on undesirable state specific Medicaid requirements, and might be challenged as an early termination of the trust, which would trigger the payback requirements in paragraph (i) of Item IV.

56. The provisions in (g) may be appropriate at the insistence of a corporate trustee that wishes to avoid any concerns about self-dealing. They are not necessary in a special needs trust, nor will they create a qualification problem.

property owned or operated by a sole proprietorship, general or limited partnership, limited liability company, or closely held corporation, or any interest in any such business enterprise, which is or may become an asset of the Trust until (i) at the election of the Trustee, an appropriate environmental audit is performed, at the expense of the Trust, to determine that conditions at such real property or operations conducted by such business enterprise are in compliance with state and federal environmental laws and regulations affecting such real property or such business enterprise, and (ii) the Trustee has accepted such property as an asset of the Trust by a separate writing delivered to the Settlor (or her designees), the Beneficiary and to the Beneficiary's legal guardian, conservator or other legal representative, if any, and to any Co-Trustee.

(i) No party to any instrument in writing signed by the Trustee shall be obliged to inquire into its validity, or be bound to see to the application by the Trustee of any money or other property paid or delivered to the Trustee by such party pursuant to the terms of any such instrument.

ITEM VIII: SPENDTHRIFT PROVISION[57/]

The Trust governed by the provisions of Item IV of this Trust Agreement is a purely discretionary, non-support spendthrift trust. Neither the Beneficiary thereof, nor any creditor of such Beneficiary, may compel any distributions from such Trust. The interest of the Beneficiary shall not be transferred, assigned or conveyed, voluntarily or involuntarily, and shall not be subject to the claims of any creditors of the Beneficiary, or of any local, state or federal governments or agencies, or of any private agencies, and shall not be subject to any legal or equitable process. The Trustee shall continue distributing Trust property directly to, or for the benefit of, the Beneficiary, as provided for herein, notwithstanding any voluntary or involuntary transfer, assignment or conveyance, or action by creditors, governments or agencies. If the Trustee is prevented by any such transfer, assignment or conveyance, or by any bankruptcy, receivership or other proceeding, from distributing property of the Trust directly to, or for the benefit of, the Beneficiary, the Trustee shall hold and accumulate the property which would otherwise have been distributed until the Trustee is able to distribute such property directly to, or for the benefit of, the Beneficiary, or until the death of the Beneficiary, whichever first occurs; and upon the death of the Beneficiary, any such property so held and accumulated shall become a part of the principal of the Trust and shall be disposed of as provided for the principal. The Trustee is authorized to defend, at the expense of the Trust, any challenge to this, or any other, provision of this Trust Agreement, or any attack of any nature on the property of the Trust. Nothing in this Item shall affect or alter the provisions of Item IV, Paragraph (i), of this Trust Agreement regarding the reimbursement of valid claims for medical assistance benefits paid on behalf of the Beneficiary during his lifetime which the Trust is legally required and obligated to

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57. POMS SI 01120.200.B.16 recognizes that traditional spendthrift law provides that creditors of a self-settled trust's settlor may reach the full amount of income or principal that a trustee may distribute to the settlor, even if trust distributions are only in the discretion of the trustee. Some state laws except self-settled trusts created for a disabled settlor, and POMS SI 01120.200.D.1 and 01120.200.D.2 only require inclusion of a spendthrift provision that is valid under state law.

There is no legislative history that explains why §1396p(d)(4)(A) requires that these trusts be created by a court order or by a parent, grandparent, guardian, conservator, or other personal representative on behalf of the disabled individual. Perhaps the answer is because Congress anticipated that the trust could be a valid spendthrift trust if the titular settlor was not the Beneficiary personally.

satisfy pursuant to 42 U.S.C. Section 1396p(d)(4), and any regulations promulgated thereunder, or any related statutes, including federal or state statutes consistent therewith, and any amendments or successor statutes thereto, any relevant provisions of the Program Operations Manual System maintained by the Social Security Administration, and any case law or other judicial pronouncements or authority relevant to same.

ITEM IX: ACCEPTANCE OF TRUST

By the execution of this Trust Agreement, the Trustee acknowledges the receipt of the property described on Exhibit A attached hereto, and acknowledges and accepts the trust hereby created upon all of the terms set forth herein.

ITEM X: GOVERNING LAW AND TRUST SITUS

The validity of the Trust shall be determined in accordance with the laws of the State of _____.[58] This Trust Agreement shall be construed and administered in accordance with the laws of the State of _____, and any relevant laws of the United States, including any valid regulations promulgated under such laws. Although the initial situs of this Trust shall be the State of _____, the Trustee may, from time to time, in the Trustee's sole discretion, change the situs of the Trust to another jurisdiction, and the laws of such new situs shall thereafter govern the administration of this Trust, but the laws of _____ shall continue to govern the construction of the Trust and the rights of the beneficiaries of the Trust. Any contrary provisions of this Trust Agreement notwithstanding, any judicial action regarding the administration of the Trust shall be brought in the _____ Court (or other court of equity) of the County in which the Beneficiary is domiciled at the time such action is filed. The Trustee hereby specifically agrees to submit to the *in personam* jurisdiction of such Court for such purpose, including, but not limited to, acceptance of service of process (including service via Certified Mail, if necessary) and appearance before such Court.

ITEM XI: TAX STATUS OF TRUST

It is the intent of the parties hereto that the Trust shall constitute a "grantor trust" with respect to the Beneficiary for Federal income tax purposes, and that the Beneficiary will be taxable on, or with respect to, any taxable income or gain attributable to the property of the Trust, and that the Beneficiary shall be responsible for satisfying, or otherwise providing for, any such tax liabilities or related charges from his personal resources, including, but not limited to, distributions from the Trust. All powers given to the Trustee by this Trust Agreement are exercisable by the Trustee only in a fiduciary capacity. Anything herein to the contrary notwithstanding, no power given to the Trustee hereunder shall be construed (i) to enable any person to purchase, exchange or otherwise deal with or dispose of the corpus or income of the Trustee for less than an adequate consideration in money or money's worth; (ii) to permit any person to borrow the income or corpus or the Trust directly or indirectly, or to authorize loans to any person, without adequate interest and adequate security; (iii) to allow any person other than

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58. Trust law would recognize the selection of the law of any state with respect to which the trust has any reasonable connection – this need not be the state of trust administration or creation, although usually it is (so that the trustee is not obliged to learn or apply the law of another jurisdiction). Note, however, that the designation here could be the law of the state in which the trust currently is being administered, such that "decanting" the trust or moving the situs (a power that appears to be lacking) can alter the governing law (to acquire benefits or dodge detriments of a particular jurisdiction's law).

the Trustee to vote or direct the voting of stock or other securities of the Trust; (iv) to allow any person to acquire the Trust corpus by substituting other property of an equivalent value; except that the Beneficiary is expressly vested with such power;[59] or (v) to authorize the Trustee to use any Trust property or the income therefrom to pay premiums on any insurance on the life of any person other than the Beneficiary.

The Trustee shall provide to the Beneficiary and his advisors all information necessary to prepare the requisite tax returns, schedules, accountings or other reports with respect to the Trust that will assist the Beneficiary in satisfying, or otherwise providing for, any such liabilities or related charges.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, as of the day and year first above written.

SETTLOR:

_____

JAMES PAUL JONES,
Court-Appointed Conservator for
Thomas Charles Smith, a Minor

Signed and delivered this _____ day of _____, 2012 in the presence of:

Notary
My Commission Expires

[SEAL]

_____
Witness

_____
Witness

_____
Witness

TRUSTEE:

RELIABLE BANK & TRUST, N.A.
By: _____
Title: _____

59. The intent of this Item is to guarantee that the trust is taxable as an income tax grantor trust to the Beneficiary and not to anyone else. As such, all income, deductions, and credits should flow through to the Beneficiary as the trust's grantor for income tax purposes. Item IV(d) at page 11 permits the trustee to satisfy the Beneficiary's income tax liability from trust assets, and those payments will reduce the trust for future Medicaid reimbursement purposes. Note that the income tax grantor trust trigger is §675(4)(c), deftly hidden in the power provided in (iv) to no one other than the Beneficiary.

Signed and delivered this _____ day of _____, 2012 in the presence of

Notary
My Commission Expires

[SEAL]

_____
Witness

_____
Witness

_____
Witness

EXHIBIT A

THOMAS CHARLES SMITH

IRREVOCABLE SUPPLEMENTAL CARE TRUST

Assets Received by RELIABLE BANK & TRUST, N.A., Trustee, as a result of the partial settlement of _____ Action No. _____, pending in the _____ Court of _____:

- $_____ cash

The following document is a sample *third-party special needs trust, drafted by a Georgia attorney and annotated by a pin-headed academic, in each case merely for illustration and educational purposes. It was crafted with a view of Georgia law and qualification as a special needs trust under the Georgia administration of the Medicaid rules, which means that it may not be appropriate in every respect for use in other jurisdictions. Moreover, things change and it will become stale. Heck, it may contain errors from its inception. So users are advised to regard it with customary caution. And the authors disclaim all responsibility for anyone's reliance on it.*

Note that getting started with the drafting of any document is difficult, especially one such as this. Most practitioners will begin the challenge with a reasonably reliable template obtained from a local group of practitioners. Drafting from scratch is scary and foolhardy, but reliance on the work of others has its dangers, too. To locate excellent resources for becoming a knowledgeable drafter of special needs trusts consult the Academy of Special Needs planners at specialneedsplanners.com and the Special Needs Alliance at specialneedsalliance.org.

SPECIAL NEEDS TRUST FOR THE PRIMARY BENEFIT OF THOMAS CHARLES SMITH

THIS AGREEMENT is made and entered into as of the _____ day of _____, 2012, by and between ROBERT WILLIAM SMITH, as the Settlor (the "Settlor"), and SHARON SMITH LANE, as the Trustee (the "Trustee"), and

W I T N E S S E T H, That:[1/]

WHEREAS, the Settlor has agreed to serve as Settlor of an irrevocable third-party supplemental care trust for the primary benefit of Thomas Charles Smith (the "Trust"), for the purpose of establishing the Trust to receive and administer assets for the primary lifetime benefit of Thomas Charles Smith, to be held and used by the Trustee (or by the Trustee's successors-in-interest), upon the uses and trusts hereinafter set forth (the "Trust Agreement");

NOW, THEREFORE, for and in consideration of the premises and the mutual covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged,[2/] the Settlor does hereby establish the Trust, so that the Trustee may receive the property detailed on the attached Exhibit A, all of the provisions of which are hereby expressly incorporated in this Trust Agreement, to have and to hold the same, in trust, for the primary benefit of Thomas Charles Smith, for and during his lifetime, upon the uses and purposes, and subject to the terms, provisions, conditions and powers, hereinafter set forth.

ITEM I: IRREVOCABILITY[3/]

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1. These first two introductory paragraphs may be useful to "explain" what is being done in the document, but they are not necessary in this third-party special needs trust. Furthermore, this trust is *not* created under the authority of 42 U.S.C. §1396p(d)(4)(A) or (d)(4)(C) (those are varieties of self-settled first-party special needs trusts, which require the involvement of a court or creation by one of the statutorily allowed actors).
2. This statement is no more true here than it is in other similar documents in which such boilerplate is found.
3. It is not intuitive that an inter vivos third-party special needs trust must be irrevocable to be effective, but that is the position taken in POMS SI 01120.200.D.1.

The Settlor has been fully advised and understands and declares that the Trust is, and shall be, irrevocable, except as otherwise expressly provided herein, and that after the execution of the Trust Agreement, the Settlor shall have no right, title or interest in, or power, privilege or incident of ownership in regard to, any of the property in the Trust. Neither the Settlor, nor any beneficiary of the Trust, shall have any right to alter, amend, revoke or terminate the Trust or any of its provisions. Nevertheless, the Trustee may amend the provisions of the Trust Agreement solely to ensure its compliance, or continued compliance, with the provisions of relevant state or federal statutes, and any regulations promulgated thereunder, including federal or state statutes consistent with the provisions and purpose of same, as well as any relevant provisions of the Program Operations Manual System maintained by the Social Security Administration,[4/] and any case law or other judicial pronouncements or authority relevant to same, pertaining to third-party special needs trusts for the benefit of persons with disabling conditions desiring to maintain their eligibility for means-tested government benefit programs such as Medicaid and Supplemental Security Income, and pending such amendment, no provision of the Trust Agreement shall be given effect to the extent that such provision would render the Trust non-compliant with same. The Trustee is authorized, in the Trustee's sole discretion, to initiate any administrative or judicial proceedings, or both, for the purpose of determining the necessity or efficacy of any such amendment hereunder. All costs relating thereto, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. If, and for so long as required by any relevant state Medicaid program(s), or by the Social Security Administration, or by any of their delegates or their successors-in-interest, the Trustee shall give written notice to same regarding any such amendment of the Trust Agreement within five days of the execution of such amendment.

ITEM II: TRUST BENEFICIARY[5/]

(a) The primary beneficiary of the Trust is, and shall be, Thomas Charles Smith, for and during his lifetime (hereinafter called the "Beneficiary"), in accordance with the detailed provisions of Item V of the Trust Agreement, until the termination of the Trust in accordance with the provisions of this Trust Agreement. The Beneficiary's date of birth is July 4, 2001.[6/]

(b) The Trustee may also use such part of the income and principal of the Trust as it may, in the Trustee's sole and absolute discretion, deem advisable to provide secondarily for the health and medical emergencies of Settlor's other lineal descendants[7/] living from time to time, in equal or unequal proportions, taking into account any other income or means of support available to them, or any of them, to the knowledge of the Trustee, for such purposes.

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4. By way of illustration, POMS SI 01120.201.F.2 was revised in May 2012 to add an example of a trust that failed the "sole benefit" requirement to qualify, because the trustee was permitted to pay for travel by family members to visit the Beneficiary. After promulgation of such a change it would be appropriate for any trustee to amend any similar offending provision to preclude future disqualification of a trust that previously was compliant.
5. A third-party special needs trust created inter vivos need not be created for a "primary" beneficiary, or even a single individual.
6. It also is not intuitive that anyone needs to know whether the Beneficiary of a third-party special needs trust is under or over a certain age, or subject to a particular definition of disability, but the Medicaid administrators expect to be told this information.
7. A useful additional provision would establish whether distribution upon termination under Item V(i) at page 13 should treat unequal distributions under this provision as advancements of the recipients' ultimate distributive shares. That matter of personal style or preference is not, however, a provision that is made necessary or desirable by the fact that this is a third-party special needs trust.

ITEM III: ADDITIONS TO TRUST[8/]

Others shall have the right at any time to add to the Trust by depositing additional property with the Trustee hereunder for the primary benefit of the Beneficiary, provided that such property is acceptable to the Trustee, and all property so deposited shall be held and distributed by the Trustee in all respects as if it had been a part of the property originally deposited hereunder. Such additional property, if any, together with the property detailed on Exhibit A, as aforesaid, together with any income or accruals with respect thereto, shall constitute the property of the Trust.

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8. It is not anticipated that multiple grantors will make contributions to this trust, because donors often disagree about who should be the remainder beneficiaries after the interest of the primary beneficiary has terminated. So additions usually occur after the trust has divided under Item V(i) at page 13 into separate shares for the remainder beneficiaries after the primary beneficiary's death. See Item VI(g) at page 16.

   On the other hand, allowing additions to this trust for the disabled beneficiary is preferable to well-intentioned benefactors making outright transfers to the Beneficiary that cause a disqualification for entitlements that the special needs trust is designed to protect. So the settlor of such a trust often sends a "friends and family" letter to potential benefactors, advising them of the merits of avoiding outright transfers to the Beneficiary, and encouraging use of a vehicle such as this trust to prevent disqualification.

   A frequent issue of administrative significance is whether it is wise to allow multiple grantors to any trust. Unlike a first-party special needs trust, in this third-party trust there is nothing special about the issues that arise (because there is no payback requirement otherwise applicable to a third-party special needs trust).

   There are, however, income tax issues to consider in regard to there being multiple grantors to this trust. A *self-settled* special needs trust would have grantor trust status under Code §677 by virtue of the settlor being the Beneficiary. All trust income, deductions, and credits would pass through to the settlor's income tax return, regardless of whether the trustee accumulated or distributed trust income. This *third-party* trust is a "complex" trust for income tax purposes, meaning that income not distributed currently is taxed to the trust at what amounts to the highest income tax rates under §1(e) of the Internal Revenue Code.

   The third form of trust for income tax purposes is a "simple" trust, which could be created in this context. The income tax consequences vary only because simple trusts must distribute all income annually (and the trust cannot make any corpus distributions during the year), which likely makes simple trusts impractical or inappropriate for special needs purposes.

   Having multiple living grantors is "messy" for Subpart E – income tax grantor trust – purposes, if the settlor or any other contributor is still living. And any additional contributions would constitute taxable gifts as to which gift tax Crummey powers would be needed to qualify for the annual exclusion. In that regard see Item IV, next below. And note that multiple lapsed Crummey powers may trigger pseudo-grantor trust consequences under §678, which may not be desirable. See annotation 49.

ITEM IV: POWER TO WITHDRAW CONTRIBUTIONS TO TRUST[9/]

During each calendar year in which a contribution is made to this Trust, each "beneficiary" of the Trust, as defined herein, shall have the right, after each direct or indirect transfer to this Trust which is treated as a gift for Federal gift tax laws, to make withdrawals from the Trust in accordance with the following provisions. For purposes of this Item, a "beneficiary" shall be defined as the Settlor's lineal descendants other than Thomas Charles Smith, living from time to time.

(a) After each direct or indirect transfer to this Trust by a donor, each beneficiary (as defined in this Item) may withdraw from the Trust an amount equal to the lesser of (A)(i) an amount no greater than the maximum amount that qualifies for the Federal annual gift tax exclusion allowed by Section 2503(b) of the Internal Revenue Code of 1986, as amended (the "Code") at the time of such transfer, or twice that amount if the donor has a spouse who consents to having such transfer considered as made one-half by such spouse under Section 2513 of the Code, (ii) less the total of the amounts which were subject to the withdrawal right of such beneficiary in connection with previous transfers to the Trust made by such donor during the same calendar year, (iii) less any other previous transfers to, or for the benefit of, such beneficiary by such donor that are eligible for the annual gift tax exclusion under Sections 2503(b) and 2503(c) of the Code, which are known to, and determined in the sole discretion of, the Trustee, during the same calendar year, or (B) the amount of such transfer divided by the number of beneficiaries.

(b) Notwithstanding any provisions of this Item to the contrary, no beneficiary may exercise a power of withdrawal hereunder during any time that he or she is subject to bankruptcy proceedings. During such a proceeding, his or her power of withdrawal shall lapse and the trustee in bankruptcy shall have no power to exercise the beneficiary's power of withdrawal hereunder.

(c) Whenever any transfer is made that gives rise to a withdrawal right under this Item, the Trustee, upon receipt of the transferred property, shall give immediate written notice of such transfer to the beneficiaries described hereinabove, who are entitled to exercise a right of withdrawal in accordance with the terms of the foregoing Paragraphs, or, if any of such individuals is under a legal disability, to his or her legal guardian or conservator or, in the case of any child for whom no legal guardian or conservator has been appointed, to a parent of such child, or other third party, acting solely on such child's behalf. If a person to whom notice is required to be given hereunder is then serving as a Trustee of this Trust, no notice shall be required to be given to such person.

(d) Any individual who possesses a right of withdrawal hereunder may exercise the withdrawal right by delivering a written instrument to the Trustee at any time on or before the thirtieth day after the later of (i) the date of the transfer to the Trust that gives rise to the withdrawal right, or (ii) the date upon which notice of such transfer is given to such person or to his or her agent. If any such individual is under a legal disability, such written instrument may be executed by his or her legal guardian or, in the case of any child for whom no legal guardian or conservator has been appointed, a parent of such child, or other third party, acting solely on such child's behalf.

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9. Note especially that this Crummey power of withdrawal would not be allowable in a first-party d4A special needs trust and should not be granted to the primary beneficiary here either, because the amount subject to the power would be regarded as an available resource to the Beneficiary for purposes of eligibility for means-tested government benefits. This entire Item may be deleted if it is unlikely that gift tax annual exclusion gifts will be made to this trust.

(e) Upon timely receipt of a written instrument of withdrawal, the Trustee shall forthwith distribute out of the Trust the amount necessary to satisfy the exercise of the withdrawal right, and for this purpose the Trustee shall retain in the Trust transferable assets sufficient to satisfy any outstanding and exercisable withdrawal rights. The Trustee shall be authorized, in satisfying the exercise of any withdrawal right, to distribute cash or other property of the Trust, and the Trustee shall further be authorized to borrow against the cash value of any life insurance policy then held in the Trust to obtain cash for such distribution.

(f) A withdrawal right that has not been exercised by a timely delivery of a written instrument to the Trustee, as specified above, shall lapse to the extent the failure by a beneficiary to withdraw his or her share of property contributed to the trust would not be considered a release of the power under Section 2514 of the Code and the holder thereof shall forever cease to have any further withdrawal right with respect to that portion of any transfer to the Trust which gave rise to the withdrawal right.

(g) To the extent that the failure by a beneficiary to withdraw his or her share of property contributed to the Trust would be considered a release of a power of appointment as provided in Section 2514 of the Code (referred to as "Excess Property"), the power to withdraw that Excess Property will continue in effect until such time as, and to the extent that, the lapse of any portion of the excess Property no longer constitutes a release as provided in Section 2514 of the Code. At that time, the right to withdraw that portion will lapse. Upon the death of each beneficiary specified in this Item, all of the beneficiary's remaining withdrawal rights will lapse.

(h) Notwithstanding any other provision in this Item, if any person making a contribution to this Trust notifies the Trustee in writing, concurrently with the making of the contribution to the Trust, that all or a portion of such contribution is not to be subject to withdrawal under this Item by any designated beneficiary, then no such beneficiary shall have the right of withdrawal and the Trustee shall permit no withdrawals hereunder with respect to such property.

ITEM V: "SUPPLEMENTAL CARE"[10] DISTRIBUTIONS

(a) The Trustee shall hold, manage, invest and reinvest the Trust property, and shall be authorized to pay to, or use for the benefit of, the Beneficiary such part of the income and principal of the Trust as the Trustee may, in the Trustee's sole and absolute discretion,[11] deem

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10. Special needs trust drafters differ in their use of terminology, some even believing that there is a regulatory difference between the terms "supplemental needs" and "special needs." The author of this form prefers "supplemental care special needs trust" but it is a difference with no practical significance.

11. The term "sole" discretion or "sole and absolute discretion" appears at least three dozen times in this document. As a drafting matter it could be eliminated from every one of these locations and a single provision (such as an expansion of the text accompanying annotation 21) instead could articulate the drafter's intent. Which is that this special needs trust exists to preclude state authorities from asserting that the Beneficiary has sufficient rights to disqualify the Beneficiary for entitlement programs. The intent is to prevent the Beneficiary from having greater rights than those meant to be granted. In this way the drafter seeks to preclude the Beneficiary (or anyone acting on behalf of the Beneficiary) from being able to force the trustee to make any distribution or exercise its discretion in any manner. Terms used, such as that the trustee has "unfettered" or "absolute" discretion, are meant to establish that the Beneficiary has no countable resource or entitlement in the trust.

There is, however, no such thing as absolute or unfettered discretion of a trustee. To be a valid trust the fiduciary's exercise of discretion must be subject to review, which is provided in a most restrictive manner by this provision. AUSTIN WAKEMAN SCOTT, WILLIAM F. FRATCHER, & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS §§13.2.3, 18.2 (5th ed.

reasonable or necessary for the "supplemental care" of the Beneficiary (as defined in Paragraph (b), below), subject to the strict limitations set out in this Trust Agreement, and without order of, or report to, any court or other administrative entity. The Trustee's sole, independent judgment and discretion in making, or declining to make, disbursements of the property of the Trust, as provided for hereinbelow, shall be final and binding on all persons interested in this Trust, including any public or private governments, agencies or entities. No court or other entity or person may substitute its judgment for the decisions of the Trustee regarding disbursements of the property of this Trust. Any income of the Trust not currently expended shall be accumulated and added to the principal of the Trust.

(b) As used in this Trust Agreement, the "supplemental care" of the Beneficiary shall encompass non-support disbursements that would not otherwise be fully paid for by any local, state or federal governments or agencies, or any private agencies or sources, which provide financial or other assistance to persons with a disabling condition such as that of the Beneficiary, or by any private insurance carrier required to cover the Beneficiary. The property of this Trust shall constitute a fund to supplement, and not to supplant, any benefits that the Beneficiary receives, or would be entitled to receive, as a result of his disabling condition, from any such governments, agencies, sources and insurance carriers.[12] In exercising the Trustee's sole and absolute discretion hereunder to disburse any property of the Trust to, or for the benefit of, the Beneficiary, the Trustee shall take into consideration all factors that the Trustee deems pertinent, including (but not limited to) any benefits the Beneficiary receives, or would be entitled to receive, as a result of his disabling condition from any local, state or federal governments or agencies, or from any private agencies, as determined in the sole judgment of the Trustee, as well as the actual and projected availability of trust funds (and collateral resources) relative to the projected medical and health care needs of the Beneficiary as ascertained from the Beneficiary's life care plan[13] and other relevant data and input relating to same, with priority to be given to

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2007): "The terms of the trust may enlarge the trustee's discretion by use of qualifying adjectives or phrases such as 'absolute,' 'sole,' 'uncontrolled,' or 'unlimited.' Such terms are not, however, interpreted literally; they do not confer on the trustee unlimited discretion," citing UNIFORM TRUST CODE §814(a): "Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as 'absolute', 'sole', or 'uncontrolled', the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."

In some cases the term "sole" is meant to establish that a trust committee, trust protector, trust advisor (or similar third-party reviewer or advocate for the Beneficiary) may make recommendations that the trustee must consider but that decisions, such as regarding distributions or investments, are the exclusive province of the trustee.

12. This nonsupport aspect is the most critical aspect of the special-needs or supplemental-needs trust concept. These trusts would essentially disqualify the Beneficiary for Supplemental Security Income or Medicaid benefits if distributions could satisfy, supplant, or displace benefits that are provided by those entitlement programs. Thus, the document *must* provide that no distributions may be made that have such effect.

13. A life care plan is an objective assessment of the Beneficiary's anticipated special needs and the estimated cost of providing for them. It identifies medical and nonmedical services, products, equipment, educational and life-enhancing experiences, and housing options that will benefit the disabled beneficiary. The plan usually is developed by a "life care planner," who may have a medical background as a nurse, physician, or rehabilitation therapist, but this emerging profession is unregulated and lacks consistent qualification prerequisites or standards for practice. Consult the American Association of Nurse Life Care Planners at aanlcp.org, and the International Association of Rehabilitation Professionals Academy of Life Care Planners Section at rehabpro.org for more information.

such medical and health care needs. Examples of such non-support disbursements for the benefit of the Beneficiary, assuming that there are no private or public funds otherwise available to fully pay for[14] same, which may be appropriate for the Trustee to make under this Trust Agreement, could include (but not be limited to) the following:[15]

(1) Any and all reasonable expenses incident to the preparation and implementation of a life care plan and individualized written rehabilitation plan for the Beneficiary (and periodic updates thereto), as recommended by the Beneficiary's life care planners, physicians, care managers, therapists, counselors, technicians, rehabilitation specialists, nutritionists, home modification and accessibility specialists, or other care providers, including, but not limited to, the reasonable compensation and other appropriate expenses of such persons and advisors;

(2) Medical, dental, rehabilitative, therapeutic and diagnostic treatments, therapies, interventions, evaluations, care and equipment, and all related supplies, whether or not experimental, necessary or life-saving, including, but not limited to, prosthetic and orthotic devices, mobility and adaptive aids, stabilizers, monitors, appliances, braces, wheelchairs (powered or manual), adaptive tools, toys and instruments, and the cost of maintaining, repairing and periodically replacing same;[16]

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14. The trustee may make distributions for support items such as food and shelter to the extent funds provided by the entitlement programs are insufficient. See POMS SI 01120.200.E.1.b. 01120.200.F regarding the impact on the Beneficiary's means-tested entitlements if distributions for food or shelter (as defined by Social Security) constitute "in-kind support and maintenance" to the Beneficiary.

15. Special needs trust drafters differ on the degree of specificity that they provide in a provision such as this, which may reflect personal style or the regulators with whom they deal at the state level. One danger with being too specific is that failure to specifically mention an item could be interpreted as meaning that it was meant to be excluded, which explains why this document includes the phrase "including, but not limited to" (or variations thereon) over three dozen times (five times in paragraph (3) alone!).

    Some drafters prefer to omit the detailed list found here and instead refer to a letter of intent that will accompany the trust, often detailing the sorts of items that are meant to be allowed and also identifying matters such as the Beneficiary's preferences and dislikes, medical or personal information, or other special circumstances that the trustee might find useful or important but that need not (or should not) appear in the trust document itself. For example, it might be wise to indicate that certain relatives have been avaricious in their desire to "enjoy" the Beneficiary's resources, individuals who – for whatever reason – should be kept at a distance from the Beneficiary, or those for whom the Beneficiary has a particular affinity and whose presence should be encouraged, to the point of expending trust funds to facilitate their access to the Beneficiary as much as possible.

16. A second matter regarding drafting style is highlighted in this paragraph. The author of this document does not use serial commas. For example, a comma would separate "upgrading" in the last line and "potentially replacing" if these are different concepts, but the lack of a comma in the term "mobility and adaptive aids" is appropriate if those are of a like kind and should be conjoined. The point of this annotation is *not* about punctuation preferences, which are not important to this learning experience. Instead, the point is about editing another drafter's document, which in this context could yield a costly error in an effort to adapt a form to the user's preferred style.

    Speaking from experience, there are aspects of special needs trust drafting that reflect important and sometimes subtle items of compromise and negotiation with the bureaucrats who administer the Medicaid program in the drafter's home state and that may not reflect pristine style but that *work* and, therefore, ought to be left alone, because the bureaucrat expects to see them and may disapprove of a document that differs. Unless an experienced

(3) Professional therapy, behavior and pain management programs, whether or not experimental, necessary or life-saving, including, but not limited to, occupational, speech, language and communication, physical (including, but not limited to, massage therapy and acupuncture), psychological, audiological, recreational (including, but not limited to, aquatic therapy, equine hippotherapy and therapeutic horseback riding), social skills, emotional and behavioral therapy and counseling, and all related costs, including, but not limited to, all equipment, tools or supplies utilized in connection therewith (including, but not limited to, hyperbaric chambers and related technology, and the related costs of training the Beneficiary, his family, educators and care givers to realize for the Beneficiary the maximum benefits therefrom;

(4) Medical and health care needs of all types, including, but not limited to, physicians' office visits, prescription and over-the-counter medications, evaluations, treatments, injections, surgeries, laboratory tests, procedures, hospitalizations and diagnostics;

(5) Reasonable compensation and appropriate expenses of the Beneficiary's guardians, conservators or custodians, if any (including, but not limited to, statutory commissions payable to same under relevant state law), and other care givers, whether professional, para-professional, rehabilitative, vocational, attendant, respite or custodial, as well as for the services of a care manager or other advisor who is experienced in overseeing the implementation of life care plans similar to that of the Beneficiary, and who is familiar with related governmental or private entitlement or assistance programs;

(6) Attendant care and adaptive aids and equipment, and related supplies, for the Beneficiary's personal needs, including, but not limited to, bathing, dressing, grooming, hygiene, incontinence care and supplies, skin care, nutrition and meal preparation, and other activities of daily living, as well as domestic services and other household maintenance services to accommodate the limitations and needs of the Beneficiary while he is living in a private or semi-private residential, or institutional, setting;

(7) Private insurance coverage for the Beneficiary, including, but not limited to, premiums attributable to health, disability, and accident insurance, as well as co-payments and deductible amounts with respect to any insurance covering the Beneficiary;

(8) The reasonable travel costs of the Beneficiary, and at least one travel companion, associated with access to medical and health care services of all types;

(9) Educational and training needs and opportunities of all types, including, but not limited to, tuition, room, board and all related costs, at private or public institutions, including special education aides and assistants, as well as home schooling or private tutoring outside of the traditional educational setting, including educational or workshop programs specializing in serving persons with impairments such as those of the Beneficiary, together with any books, supplies or other materials recommended for the Beneficiary in connection therewith;

(10) The reasonable travel and transportation costs of the Beneficiary, and at least one travel companion, to and from any school or other residential accommodation which is removed from the residence of the Beneficiary's immediate family members and legal guardian of the person, if any;

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hand is overseeing all changes made, it is remarkably easy to make an unintended and costly mistake if the editor is not totally familiar with the rules and administration involved. Strong as may be the desire to "improve" a form, rookies are strongly advised to leave their red pencil in the drawer until they are well-steeped in the law and the lore of this area of practice.

(11) The purchase or financing (in whole or in part) of a private residence, and improvements and adaptations thereto, suitable for an individual with disabilities such as those of the Beneficiary, customized and adapted to accommodate his limitations and medical needs, and those of his care givers and members of his immediate family, as well as the expense of insuring (at its replacement cost), securing (including, for this purpose, the installation and maintenance of an emergency communications system), and maintaining such residence, and the land adjoining same, in good condition and repair, with title to such real estate to be held by the Trustee as an asset of the trust until the earlier of (i) a distribution during the term of the trust by the Trustee (in the Trustee's sole and absolute discretion) to the Beneficiary of the trust's interest in said residence, or (ii) upon the termination of the trust;[17]

(12) Alterations or adaptations to a pre-existing residence inhabited by the Beneficiary, but not titled in the name of the trust, which are necessary or advisable to accommodate his limitations and medical needs, as well as the expenses of securing (including, for this purpose, the installation and maintenance of an emergency communications system), insuring (at its replacement cost) and maintaining such residence, and the land adjoining same, in good condition and repair;

(13) The costs of the Beneficiary's residence in an assisted living environment, on a long-term or short-term basis, including, but not limited to, the cost of his accommodations, including private room, board, vocational and workshop services, and related incidentals (provided, however, that such costs are not otherwise defrayed by any public or private entitlement or assistance programs for which the Beneficiary is, or may be, eligible as a result of his disability, as provided above);

(14) The purchase or lease of appropriate modes of transportation for the Beneficiary, including, but not limited to, vans or automobiles[18] which are specially equipped and adapted for the Beneficiary's particular limitations (or the costs of equipping or adapting an existing vehicle to accommodate the Beneficiary's said limitations), and the costs of insuring, maintaining, fueling, repairing and periodically replacing same, and the costs of installing and maintaining an appropriate emergency communications system therein, including, but not limited to, a satellite location system such as "On Star," with title thereto to be held as determined by the Trustee to be in the best interest of the Beneficiary and the Trust;

(15) Appropriate home-based and community-based recreational opportunities and social initiatives and activities, including, but not limited to, membership in community facilities such as the local Jewish Community Center and YMCA/YWCA, as well as the costs of summer camp (especially programs utilizing assistive technology and augmentative communication elements), hobbies and extracurricular activities, and the

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17. In the similar item in the first-party d4A special needs trust there is no provision for title to pass to the Beneficiary, because doing so would violate the payback requirement in that situation. A dwelling is an exempt asset, which the Beneficiary may own for means-tested government benefits such as Medicaid and Supplemental Security Income, but the Beneficiary owning a dwelling is not generally a good idea because of issues relating to financial abuse of the Beneficiary and the possibility of a state recovery at the Beneficiary's death in exchange for entitlements provided to the Beneficiary. Thus, often it is better for title to be held in the trust. Here this provision could simply specify that title is an asset of the trust for distribution as a part thereof – without articulating the detail about where, when, or how that title will pass in the future.

18. POMS SI 01120.201.F.1, which requires that the title to any such vehicle be held by a d4A trust, does not apply to a third-party trust.

out-of-pocket and travel costs of the Beneficiary, and at least one travel companion, associated therewith;

(16) Appropriate furniture and furnishings for the residence of the Beneficiary, whether in a private residence or in an assisted living environment, customized and adapted to accommodate his physical limitations, and periodic replacements of same;

(17) Appropriate periodic vacation and sabbaticals for the Beneficiary, including, but not limited to, the reasonable travel costs of the Beneficiary (including, but not limited to, related costs such as luggage appropriate for the use of the Beneficiary), and at least one travel companion, associated therewith;

(18) Television, audio and video cassette recorders,[19] computers, augmentative communication systems and related software and hardware, other electronics or machines which might enhance the Beneficiary's quality of life, and the related costs of appropriate training for the Beneficiary, his family, educators and care givers in the proper use thereof;

(19) Professional services rendered for the benefit of the Beneficiary, including, but not limited to, legal, fiduciary, accounting and bookkeeping services and advice;

(20) Funeral and burial services for the Beneficiary, including, but not limited to, embalming or cremation services, an appropriate casket, vault or urn, an appropriate plot and marker, and all related necessary professional funeral services, and the cost of an appropriate insurance policy to secure payment of some or all of such services and expenses;[20]

(21) The reasonable expenses of purchasing, maintaining and caring for an animal companion for the Beneficiary, or specially trained medical, therapy or service animals, if his guardian, conservator or custodian believes such would be in his best interest, and if the rules and regulations of his residence would so permit; and

(22) Such other uses and purposes as the Trustee may, in the Trustee's discretion, deem appropriate to provide for the Beneficiary under all of the circumstances (including, but not limited to, the provisions and effect of any relevant laws of any jurisdiction which may apply to the Beneficiary from time to time, and the consequences to the Beneficiary of the application of such laws regarding his ongoing eligibility for means-tested benefits or assistance programs for which he may be eligible as a result of his disability), provided that such uses and purposes are for the Beneficiary's benefit.

(c) In exercising the Trustee's sole and absolute discretion regarding distributions of the income and principal of the Trust to, or for the benefit of, the Beneficiary, as set forth in Paragraph (b), above, the Trustee shall consult periodically with the Beneficiary, the Beneficiary's immediate family, the Beneficiary's legal guardian of the person, conservator, or other legal representative, if any, as well as any persons designated by the Beneficiary, the Beneficiary's immediate family or his legal guardian of the person, conservator, or other legal representative, if any, and shall be guided, but not bound, thereby.[21] The Trustee shall also

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19. Obviously documents become stale. Editing to make them more current can improve them in certain circumstances but, as stated in annotation 16, great care is required so as not to mess up an otherwise qualified document.

20. POMS SI 01120.203.B.3.b, which requires prepaid funeral arrangements in a d4A trust, does not apply to a third-party trust.

21. Notice the nimble dance contained in this provision, requiring the trustee to consult ("shall consult" and "shall be guided") but seeking to maintain the distance needed to preclude any suggestion that the Beneficiary or advocates on the Beneficiary's behalf have any right to direct or enforce the trustee's discretion. See annotation 11 regarding this endeavor.

consult directly with any care manager hired by the Trustee, or otherwise working with the Beneficiary to the knowledge of the Trustee, and any persons or institutions involved in implementing a personal life care plan, or similar arrangement, for the Beneficiary to the knowledge of the Trustee, and the Trustee shall be entitled to rely in good faith on any recommendations proffered by such persons or institutions, but shall not be bound thereby. Furthermore, the Trustee may take into account any other resources or support available to the Beneficiary to the knowledge of the Trustee, including any legal obligation of support which any person may owe to the Beneficiary at the time of any distribution from the Trust hereunder, as well as public or private entitlement and assistance programs for which the Beneficiary is, or may be, eligible as a result of his disability, as determined in the sole judgment of the Trustee.[22/]

(d) In addition to the permissible discretionary distributions of the income and principal of the Trust, as described in Paragraph (b), above, the Trustee may also make distributions from the income or principal of the Trust, as the Trustee determines in reliance on information provided by the Beneficiary's tax advisors, for the purpose of satisfying or otherwise providing for, in whole or in part, the Federal, state and local income, transfer and miscellaneous tax liabilities, and related charges, for which the Beneficiary is, or may be, liable, whether pertaining to the property of the Trust, or otherwise. To the extent practicable, the Trustee shall remit any such distributions directly to the appropriate taxing or other authority in satisfaction of the Beneficiary's said liabilities.[23/] The payments authorized by this Paragraph are discretionary, and no claims or rights to payment asserted by any third party may be enforced against this Trust by virtue of such discretionary authority.

(e) In making distributions of the income and principal of the Trust, the Trustee shall, to the extent practicable, make such disbursements directly to the provider of the services or other consideration furnished to, or for the benefit of, the Beneficiary, and the Trustee shall not, to the extent practicable, make distributions directly to the Beneficiary, to his custodian, or to the legal guardian, conservator, or other legal representative, of the Beneficiary, if any, for such services or other consideration furnished by such providers. Provided, however, that if a conservator of the Beneficiary has been appointed and continues to serve, the Trustee may, in the Trustee's discretion, make such distributions to such conservator within the parameters of such conservatorship. Furthermore, the Trustee may, in the Trustee's sole and absolute discretion, pay directly to the Beneficiary, or to his custodian, legal guardian, conservator or other legal representative, if any, such amounts as the Trustee deems reasonable and proper, in the Trustee's sole and absolute discretion, to provide the Beneficiary with discretionary spending money that will not jeopardize the Beneficiary's eligibility for any benefits that the Beneficiary receives, or would be entitled to receive, as a result of his disabling condition from any public or private entitlement or assistance programs.

(f) Notwithstanding the foregoing provisions of this Trust Agreement governing distributions of the income and principal of the Trust to, or for the benefit of, the Beneficiary, the Trustee shall not be authorized to use any income or principal of the Trust to satisfy, in whole or

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22. The traditional common law presumption is that a trustee may *not* consider a beneficiary's other income or resources available to a beneficiary when exercising its discretion to make distributions, the notion being that a resourceful or productive beneficiary should not be penalized for being gainful while a ne'er-do-well beneficiary is favored with larger trust distributions. In this context it is appropriate to preserve trust funds as a safety net resource for the Beneficiary, to guard against other available resources being exhausted before the Beneficiary's death.

23. Direct payment here and in paragraph (e) below is intended to preclude Medicaid authorities from asserting that the Beneficiary is receiving inappropriate and potentially disqualifying distributions.

in part, any legal obligation, of support or otherwise, which any individual may owe to the Beneficiary at the time of such distribution.[24]

(g) The Trustee shall undertake, or cause to be undertaken, at the expense of the Trust, a comprehensive annual review, or appropriate update, of any public or private entitlement or assistance programs for which the Beneficiary is, or may be, eligible as a result of his disabling condition, and shall advise the Beneficiary, and his custodian or legal guardian, conservator, or other legal representative, if any, regarding same.[25] The Trustee is authorized, in the Trustee's sole and absolute discretion, to initiate administrative or judicial proceedings, or both, for the purpose of determining the eligibility of the Beneficiary for such programs, but shall not be required to do so. All costs relating thereto, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. The Trustee shall be entitled to rely absolutely on, and shall bear no responsibility for, any determination of a person hired by the Trustee with reasonable care for the purpose of advising the Trustee regarding the availability of any public or private entitlement or assistance programs as a source of support and benefits for the Beneficiary, and the effect of any distribution from the Trust on the Beneficiary's eligibility to receive support and benefits from such sources. The Trustee shall not be responsible for seeking or obtaining such support and benefits for the Beneficiary, but shall cooperate as necessary with the Beneficiary or the Beneficiary's custodian or legal guardian, conservator, or other legal representative, if any, as such persons seek support and benefits for the Beneficiary from any such programs. However, the Trustee shall not be liable to any beneficiary of the Trust, whether primary or contingent, or any other person interested in the Trust, by reason of the failure of such persons to seek or obtain benefits for the Beneficiary from such programs. Any such benefits thus payable to, or for the benefit of, the Beneficiary shall not be commingled with the property of the Trust. Nothing in this Trust Agreement shall be construed to require any such benefits to be added to the Trust.

(h) During the lifetime of the Beneficiary, the Trustee shall not expend any of the property of the Trust for services, benefits, medical or other care, equipment or other property otherwise available to the Beneficiary from any local, state or federal governments or agencies, or from any private agencies or sources, or from any private insurance carrier required to cover the Beneficiary, as determined in the sole judgment of the Trustee. If such benefits are not reasonably available to the Beneficiary, as determined in the sole judgment of the Trustee, taking

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24. Estate planners use similar language – often known as an Upjohn clause – to preclude the government from asserting a theory that distributions from a trust to an individual to whom the trustee owes a legal obligation of support constitute an indirect benefit to the trustee, because they satisfy or discharge that legal obligation of support. Grantor trust provision §677(b) is a very careful reflection of the reality that distributions from trusts typically do *not* serve to displace or supplant another individual's legal obligation of support, yet the government frequently asserts the "discharge theory" to impute enjoyment or control that it should not. To preclude that theory drafters simply provide that no distribution shall be made that would have the effect of discharging any person's legal obligation of support, knowing that under state law distributions will not have that effect and, therefore, that the clause does not actually hobble the trustee. Here the object is to prevent Medicaid authorities from asserting that the trust fails as a special needs trust (because, absent this provision, it might be deemed to supplant basic support needs).

25. A trustee may need a review or update from an allied professional (such as a life care planner) to be adequately informed about those government benefits for which a disabled beneficiary may be eligible. It is not, however, the trustee's responsibility to apply for governmental benefits for the Beneficiary. Instead, this typically will be done by the Beneficiary (if competent), a court-appointed guardian or conservator, or the Beneficiary's Representative Payee.

into consideration (i) the actions which have been, or could reasonably be, taken by the Beneficiary, or the Beneficiary's legal guardian, conservator, or other legal representative, if any, to seek such benefits from such sources, (ii) the success, or likely success, of such actions, and the time frame therefor, (iii) the expense, or likely expense, of such actions, relative to the benefits secured, or likely to be secured, by such actions, (iv) the relative value to the Beneficiary of a possible reduction in such benefits ensuing from the use of the property of the trust for any of the purposes set forth herein, and (v) the effect of any financial limitations with respect to eligibility for such benefits on the Beneficiary's ability to engage in income-producing activity that he would otherwise be capable of, and inclined to pursue, and the relative overall effect of any such earned income on the Beneficiary considering all of the circumstances, then the Trustee may, in the Trustee's sole and absolute discretion, expend the property of the Trust for the purposes set forth in this Item, and shall not be liable to any beneficiary of the Trust, whether primary or contingent, or any other person interested in the Trust, for such expenditures of Trust property. During the lifetime of the Beneficiary, the Trustee shall deny any request by any public or private entity to disburse the property of the Trust for support, services, benefits, medical or other care, equipment or other property that such entity has the obligation to provide to the Beneficiary, as determined in the sole judgment of the Trustee. During the lifetime of the Beneficiary, the Trustee shall similarly deny any request by any public or private entity administering such benefits to petition a court or any other administrative body for the release of Trust property for such purpose. All costs relating to such denials by the Trustee, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. However, the Trustee shall not be liable to any beneficiary of the Trust, whether primary or contingent, or any other person interested in the Trust, by reason of any failure to comply fully with the provisions of this Paragraph, unless such failure was due to the bad faith or willful misconduct of the Trustee.

(i) Upon the death of the Beneficiary, any property remaining in the Trust shall be distributed to such persons, and in such manner, as the Beneficiary may direct or appoint by his Last Will and Testament duly admitted to probate, making specific reference to this power. To the extent the Beneficiary does not effectively exercise this power of appointment,[26] any such property remaining in the Trust shall be distributed *per stirpes* to the Beneficiary's then living lineal descendants or, if none, then *per stirpes* to the Settlor's then living lineal descendants, thus terminating the Trust. Notwithstanding the foregoing, the share hereunder of any person who has not yet attained thirty-five years of age at the time when such person would be entitled to receive any share of this Trust hereunder shall be held in further and separate trust for such person, in accordance with the uses and trusts set out in Item VI below.

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26. The following provision may be useful in determining whether the Beneficiary effectively exercised the power:

> In disposing of any trust property subject to the Beneficiary's power to appoint by will, the Trustee may rely upon an instrument admitted to probate in any jurisdiction as the will of the Beneficiary or may assume that the power was not exercised if the Trustee has no actual notice within three months of the Beneficiary's death of a will that exercises the power. The Trustee may rely on any document or other evidence in making payment under this trust and shall not be liable for any payment made in good faith before the Trustee receives actual notice of a changed situation.

ITEM VI: TRUSTS FOR COLLATERAL RELATIVES[27]

Following are the terms of any separate trust to be established after the death of Thomas Charles Smith for the benefit of any person who has not attained thirty-five years of age at the time when he or he is otherwise entitled to receive any property under Item V, Paragraph (i), of this Trust Agreement. The person for whom any such separate trust is directed to be established hereunder, as aforesaid, shall be referred to hereinafter as the "Beneficiary" of his or his separate trust.

(a) The Trustee shall hold, manage, invest and reinvest the property of each separate trust hereunder, for the sole benefit of the Beneficiary thereof. The Trustee shall use such part of the income and principal of the trust as the Trustee may deem necessary, in the Trustee's sole and absolute discretion and judgment, to provide for the support, health, maintenance and education (including private or public preschool, primary or secondary school, college or university training at the undergraduate, graduate, or professional level, tutoring, internship, apprenticeship, vocational training, and the like) of the Beneficiary, taking into consideration any other available resources which the Beneficiary may have to the knowledge of the Trustee; provided, however, that no such distribution may be used to defray any legal obligation, of support or otherwise, which the Trustee, or any other person, may have with respect to the Beneficiary. Any income not used currently shall be accumulated and added to the principal of the trust.[28]

(b) The Trustee is also authorized in the Trustee's discretion, at any time and from time to time, to distribute to the Beneficiary a portion of the principal of the property in his or her trust to enable the Beneficiary to marry, to purchase a home, to enter into a trade, business or profession, or for similar purposes, if the Trustee deems such distribution to be in the best interest of the Beneficiary; provided, however, that no such distribution may be used to defray any legal obligation, of support or otherwise, which the Trustee, or any other person, may have with respect to the Beneficiary.

(c) Except as expressly provided otherwise hereinbelow, after division of the trust into shares and after the Beneficiary has reached[29] the age of ** years,[30] the Beneficiary may withdraw any part or all of the principal of his or her share at any time or times, but not to exceed in the aggregate one-half in value thereof prior to the later to occur of * years after division of this trust

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27. These provisions would disqualify a beneficiary of these trust shares for any means-tested entitlement program such as Medicaid or Supplemental Security Income, which raises the possibility that the trustee should have the authority to create a third-party special needs trust for the benefit of such a remainder beneficiary. See Paragraph (d) below.

28. This provision, often referred to as an Upjohn clause, is intended to prevent the government from arguing that distributions under this paragraph (a), as well as those under paragraph (b), constitute an indirect benefit to any person who is legally obligated to support the Beneficiary, with attendant income and wealth transfer tax consequences to such a person.

29. Note that this does not say "When the Beneficiary reaches" the specified age, because this provision must apply even if the Beneficiary reached that age before division of the trust into shares, and this right is an on-going entitlement, not a one-time event, making an occurrence-"triggering" provision inappropriate.

30. This could be any age. The addition of the "later of" element is directed at the reality that most documents of this variety use ages such as 25, 30, or 35 and the norm is for a beneficiary to become entitled to a share much later in life, meaning that the two- or three-stage "out" of this type of provision would be frustrated — the entire trust would be subject to withdrawal as soon as the trust was divided. As noted next below, an immediate entitlement to the whole fund would defeat the purpose behind the staggered right of withdrawal, which is designed to permit the Beneficiary to learn from any mistakes made with earlier withdrawals.

or the beneficiary having reached the age of ** years.[31] The value of the share shall be determined as of the Beneficiary's first exercise of this withdrawal right, plus the value of any additions made thereafter (determined at the time of the addition). The trustee shall make payment without question upon the Beneficiary's written request. This right of withdrawal shall be a privilege that may be exercised only voluntarily and shall not include an involuntary exercise.[32]

Upon the death of the Beneficiary before receiving his or her share in full, the Beneficiary's share shall be held in trust hereunder or distributed to or in trust for such appointee or appointees, with such powers and in such manner and proportions as the Beneficiary may appoint by his or her will making specific reference to this power of appointment,[33] except that any part of the Beneficiary's share not subject to withdrawal prior to the death of the Beneficiary may be appointed only to or for the benefit of any one or more of the Beneficiary's surviving spouse, the Beneficiary's descendants and their respective spouses, and descendants of the settlor (other than the Beneficiary) and their respective spouses. For purposes of this provision, the term "spouse" shall include a widow or widower, regardless of remarriage.

Upon the death of a beneficiary any part of his or her share not effectively appointed[34] shall be distributed per stirpes to his or her then living descendants or, if none, then per stirpes to the then living descendants of the Beneficiary's nearest lineal ancestor of whom descendants are then living, except that each portion otherwise distributable to a beneficiary for whom a share of this trust is then held hereunder shall be added to that share.[35]

(d) Notwithstanding any provisions of this trust to the contrary, if any beneficiary of any trust established under this document has been determined to be disabled or incapacitated, then any outright distributions to such beneficiary contemplated under this trust which still remain to

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31. This age typically is five to ten years older than when the first withdrawal right became exercisable, the expectation being that the Beneficiary will learn a few lessons from any mistakes that were made with respect to earlier withdrawals, without risking his or her entire inheritance. If the share will be large enough to justify withdrawal in three stages, substitute the following for the provision prior to this point:

    After division of the trust into shares and after the following periods of time, the Beneficiary may withdraw from the principal of his or her share at any time or times not to exceed in the aggregate:

    One-third in value after the Beneficiary having reached the age of ** years;

    Half in value (after deducting any amount subject to withdrawal but not actually withdrawn) after the later to occur of * years after division of this trust and the Beneficiary having reached the age of ** years; and

    The balance after the later to occur of * years after division of this trust and the Beneficiary having reached the age of ** years.

32. This provision is similar to a spendthrift clause, which otherwise might not apply to this withdrawal right. This provision may not be effective, but what is to be lost for inclusion?

33. This is a general testamentary power of appointment for wealth transfer tax purposes, but only to the extent the Beneficiary is treated for tax purposes as the owner of the trust because of the Beneficiary's power of withdrawal. In some cases it will be preferable for this power to be available inter vivos as well.

34. Notice that this provision refers to a failure to effectively exercise the power, not to a mere failure to exercise the power, making this default provision applicable if the Beneficiary exercised in violation of the Rule Against Perpetuities or in favor of impermissible appointees or otherwise in violation of the power of appointment.

35. This "add to shares" provision is designed to avoid a multiplicity of shares for any particular descendant.

be effected shall be postponed until such time as it is determined that such beneficiary is no longer disabled or incapacitated and, pending such determination, the property which would otherwise have been distributed outright to such beneficiary hereunder, but for this provision, shall instead continue to be held and administered by the Trustee upon the same terms which applied hereunder prior to the time when such beneficiary was entitled to receive his or her first outright distribution hereunder. Alternatively, the Trustee may encroach upon the separate trust of the Beneficiary to fund a new and different trust for the "supplemental care" of the Beneficiary, as such term is used in Item V of this Trust Agreement, above.

(e) Notwithstanding any of the foregoing provisions of this Trust to the contrary, one day prior to expiration of the permissible period under the relevant application of the Rule Against Perpetuities, if any, determined using as measuring lives in being only persons who are beneficiaries of any trust created by or pursuant to this instrument, all of the trusts established hereunder which are then held by the Trustee shall terminate, and the property then remaining in each such trust shall be distributed to the Beneficiary thereof.

(f) The interest of any Beneficiary in any trust created hereunder shall not be transferred, assigned or conveyed, and shall not be subject to the claims of any creditors of such beneficiary, and the Trustee shall continue distributing trust property directly to, or for the benefit of, such Beneficiary, as provided for herein, notwithstanding any transfer, assignment or conveyance, or action by creditors. If the Trustee is prevented by any transfer, assignment or conveyance, or by any bankruptcy, receivership or other proceeding, from distributing property directly to or for the benefit of any Beneficiary, the Trustee shall hold and accumulate the property which would otherwise have been distributed until the Trustee is able to distribute such property directly to or for the benefit of such Beneficiary, or until the death of such Beneficiary, whichever first occurs; and upon the death of such Beneficiary, any such property so held and accumulated shall become a part of the principal of the trust and shall be disposed of as provided for the principal.[36]

(g) Others shall have the right at any time to add to any trust established hereunder by depositing additional property with the Trustee hereunder, provided that such property is acceptable to the Trustee, and all property so deposited shall be held, administered and distributed by the Trustee in all respects as if it had been a part of the property originally deposited hereunder, unless the instrument by which such property is deposited otherwise provides.[37]

(h) Whenever the Trustee makes any distribution of income or principal of any trust created hereunder, the Trustee shall be authorized to withhold distribution of any amount of property sufficient, in the Trustee's judgment, to cover any liability that may be imposed on the Trustee for any taxes imposed on any transfer deemed a generation-skipping transfer under the provisions of the Internal Revenue Code of 1986, as amended, or for other taxes, until such liability has been finally determined.[38]

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36. This provision is meant to apply only to trusts held under Item VI, but this provision could be eliminated and the spendthrift provision in Item IX at page 24 could be made to apply to all trusts created under this entire document.

37. This provision also is meant to apply only to trusts held under Item VI, but it too could be eliminated and the provision in Item III at page 3 could be made to apply to all trusts created under this entire document.

38. This provision reflects the tax liability provision in §2603(a)(2), applicable only in the event of a taxable termination for generation-skipping transfer tax purposes.

ITEM VII: PROVISIONS CONCERNING TRUSTEE

(a) The Settlor hereby nominates, constitutes and appoints the Beneficiary's aunt, SHARON SMITH LANE, as the initial Trustee of the Trust created under Item V of this Trust Agreement, as well as of any separate trust created under Item VI of this Trust Agreement. If she should die or for any other reason fail or cease to serve as such, then the Settlor hereby nominates, constitutes and appoints the following persons to serve as successor Trustee, each to act singly in the order listed:

(1) _____.

(2) _____.

(3) RELIABLE BANK & TRUST, N.A.

Under no circumstances shall the Beneficiary of the Trust created under Item V of this Trust Agreement serve as Trustee thereof.[39]

(b) Any individual Trustee serving hereunder may receive reasonable compensation for such services, and may be reimbursed for out-of-pocket expenses reasonably incurred in connection with the administration of the trust established hereunder. Any corporate fiduciary serving hereunder shall receive as compensation for its services as Trustee the fees it normally charges to similar trusts under its regularly published fee schedule as the same may, from time to time, be amended. Any reference herein to a corporate fiduciary shall be deemed to include any bank or trust company into which it may hereafter be merged or consolidated.

(c) Any Trustee serving hereunder may at any time resign by instrument in writing signed by such Trustee and delivered to the Settlor (or his designees), to the Beneficiary and to his custodian or legal guardian, conservator, or other legal representative, if any.[40] To the extent that the vacancy created by such resignation cannot be filled pursuant to the provisions of Paragraph (a), above, the Settlor (or his designees), or the Beneficiary's legal guardian, conservator, or other legal representative, if any, as the case may be, within sixty days of receiving written notice of the intention of a Trustee to resign hereunder with no successor Trustee willing or able to fill the vacancy created thereby, shall designate a qualified successor Trustee by instrument in writing delivered to the resigning Trustee. Any person designated to succeed a resigning Trustee, as provided for hereinabove, shall first execute a formal, written acceptance of the duties and obligations of the resigning Trustee, and file an executed copy of such acceptance with the resigning Trustee. Prior to delivering or releasing any part of the property of the Trust to any successor Trustee, any resigning Trustee may require an approval of his or his activities during his or her term of service as Trustee, in a form acceptable to the resigning Trustee, including, but not limited to, by order of a court of competent jurisdiction.[41] The costs of any such accounting or approval, including, but not limited to, reasonable attorneys' fees, shall be a proper expense of the Trust. The resigning Trustee shall transfer all property of the Trust then in his or her hands to the successor Trustee, and such resigning Trustee shall thereupon and thereby be discharged of all further duties and obligations under or arising out of such fiduciary capacity.

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39. The Beneficiary may be fully capable to serve, but being in control of discretionary distributions to the Beneficiary would cause the trust to be regarded as a countable resource and destroy the primary purpose for the trust.

40. If the Beneficiary is fully capable, then there may be none of these actors involved, in which case the Beneficiary could designate the qualified successor trustee. That control will not disqualify the trust or cause it to be a countable resource.

41. The trustee need not go to court if it is comfortable with approval from beneficiaries of the trust or their personal representatives, but it may seek a court order if individual approvals are not regarded as adequate protection.

(d) Notwithstanding the foregoing fiduciary appointment of any corporate fiduciary[42] as a successor Trustee or Co-Trustee of the various trusts established hereunder, the persons who have reached majority age who are then income beneficiaries of such trust (or the legal guardians, conservators or other legal representatives, if any, of any such persons who are minors or laboring under any other incapacity), shall have the right, at any time and from time to time, to remove any corporate fiduciary and to appoint a successor corporate fiduciary in its place, by instrument in writing signed by such individuals and delivered to the institutions so removed and appointed, and to the persons then entitled to the income from such trust (or to the legal guardians, conservators or other legal representatives, if any, of any such persons who are minors, or are otherwise incapacitated); provided, however, that the entity designated to succeed such removed fiduciary is then administering trust assets of at least $200 million, and executes a formal written acceptance of the duties and obligations of the removed fiduciary hereunder, and files an executed copy of such acceptance with the removed fiduciary and such individuals. The removed fiduciary shall transfer all property of the trust then in the hands of the removed fiduciary to such successor fiduciary, and such removed fiduciary shall thereupon and thereby be discharged of all further duties and obligations under, or arising out of, such fiduciary service.

(e) If for any reason no successor trustee is willing and able to act,[43] notwithstanding the foregoing provisions of this Item, then a successor Trustee shall be appointed by any court then having jurisdiction over the Trust, upon application of any person interested in the Trust.

(f) Any successor Trustee shall have and may exercise any and all of the powers, privileges, immunities and exemptions herein conferred on the initial Trustee as fully and to the same extent as if such successor Trustee had originally been named as a Trustee herein. No successor Trustee shall be required to inquire into or audit the acts or doings of any predecessor Trustee.

(g) Any Trustee hereunder, regardless of whether they are residents of the State of _____, shall not be required to give any bond, surety or security, or to make or file any reports, annual or other returns, or inventory, inventories or appraisals of the property of my estate or any trust hereunder, to any court, but the Trustee shall furnish at least annually to each beneficiary entitled to receive income hereunder a statement of all receipts and disbursements made hereunder.

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42. Experience suggests that individual fiduciaries may be less reliable than any corporate fiduciary, because they are untested and have no track record, yet families are less comfortable with corporate fiduciaries and may have greater – albeit unfounded – faith in the individuals who may serve as fiduciary. The drafter therefore should consider whether this provision, which as drafted only allows removal of a *corporate* fiduciary, also should apply to any individual fiduciary.

43. One of the most difficult aspects of trust design and administration is providing for trustee succession. At some point the list of designated fiduciaries may be exhausted, but black letter law specifies that the trust will not fail for the lack of a trustee unless only particular trustees are allowable. If not, the key to effective administration is to provide a viable means for selection of successors that will stand the test of time. This trust may exist for multiple generations, although it will not continue for as long as some dynasty trusts, so the challenge here is less difficult than in a perpetual dynasty trust. Common options for the selection include delegation to the local court with jurisdiction over the trust administration, or reliance on some other body or person (such as a trust advisor or protector, which just pushes the issue down to selection of *their* successors), or the presiding judge of a local court or perhaps the lead lawyer in whatever amounts to the successor of the drafter's law firm.

ITEM VIII: POWERS OF TRUSTEE

(a) In the management, care and disposition of every trust created hereunder, the Settlor confers upon the Trustee, and any successors in office, in addition to those powers set out in other Items of this Trust Agreement, the power to do all things and execute such instruments as may be deemed necessary or proper and as may be incident to such office, including the following powers, all of which may be exercised without order of, or report to, any court:

(1) To sell, exchange or otherwise dispose of any property at any time held or acquired hereunder, at public or private sale, for cash or on terms, without advertisement, including the right to lease and to grant options to buy for any term notwithstanding the period of the Trust, and to grant options (including writing covered call options) to buy for any period, including a period beyond the duration of the Trust;

(2) To invest and reinvest all monies in such stocks, bonds, securities, investment company or trust shares (including investments in investment companies or trusts and in collective or commingled investment funds offered by or through any corporate Trustee or any Affiliated Entity), mortgages, notes, choses in action, real estate, improvements thereon and other property as the Trustee may deem best, whether the same be legal investments for fiduciaries or not, and without regard to any law now or hereafter in force limiting investments of fiduciaries or the fact that a security is purchased from an underwriting syndicate that includes any corporate Trustee or an Affiliated Entity of any corporate Trustee as a member, or that the security was underwritten by such a syndicate and is purchased from a member of that syndicate; provided, however, that the Trustee shall in all events invest and reinvest the property of the Trust as would prudent persons of discretion and intelligence who are seeking a reasonable income and the preservation of their capital, any provision of this Trust Agreement to the contrary notwithstanding;

(3) To retain for investment any property or choses in action deposited with the Trustee, including any stock in any corporate Trustee or in a parent or Affiliated Entity of the Trustee or in a company whose stock the Trustee or an Affiliated Entity holds as an asset, either individually or in a fiduciary capacity;

(4) To vote in person or by proxy any corporate stock or other security and to agree to or take any other action in regard to any reorganization, merger, consolidation, liquidation, bankruptcy or other procedure or proceeding affecting any stock, bond, note or other property;

(5) To retain and employ real estate, business and other brokers, investment advisors, lawyers, accountants and other agents, if such employment be deemed necessary, and to pay reasonable compensation for their services from the property of the Trust; including, but not limited to, the services of health care management providers to implement or facilitate any of the purposes described in Item V, Paragraph (b), above, or to perform any of the duties otherwise ascribed to the Trustee in the said Item V, as the Trustee reasonably determines to be within the expertise of such providers, and the Trustee shall be entitled to rely absolutely on, and shall bear no responsibility for, any determination or action of any such providers, hired by the Trustee with reasonable care for such purposes;

(6) To compromise, settle or adjust any claim or demand by or against the Trust and to agree to any rescission or modification of any contract or agreement affecting the Trust;

(7) To renew any indebtedness, as well as to borrow money, and to secure the same by mortgaging, pledging and conveying any property of the Trust, including the

power to borrow from the Trustee or any Affiliated Entity of the Trustee at a reasonable rate of interest;

(8) To retain and carry on any business in which the Trust may acquire an interest, to acquire additional interest in any such business, to agree to the liquidation in kind of any corporation in which the Trust may have any interest and to carry on the business thereof, to join with other owners in adopting any form of management for any business or property in which the Trust may have an interest, to become or remain a partner, general or limited, in regard to any such business or property, to incorporate any such business or property and to hold the stock or other securities as an investment, and to employ agents and confer on them authority to manage and operate such business, property or corporation, without liability for the acts of any such agents or for any loss, liability or indebtedness of such business if the management is selected or retained with reasonable care;

(9) To register any stock, bond or other security in the name of a nominee, and use nationally recognized depositories, without the addition of words indicating that such security is held in a fiduciary capacity; but accurate records shall be maintained showing that such security is a trust asset and the Trustee shall be responsible for the acts of such nominee;

(10) To pay from the Trust all charges which the Trustee deems necessary or appropriate to comply with laws regulating environmental conditions and to remedy or ameliorate any such conditions which adversely affect the Trust, and to pay any liabilities, fines or penalties incurred by the Trustee personally on account of such conditions, other than any such charges that are directly caused by the Trustee's own gross negligence or willful misconduct, and to apportion all of such charges in such manner as the Trustee deems fair, prudent and equitable under all of the circumstances;

(11) To engage the services, as a reasonable expense of the trust, of architects or other professionals with appropriate expertise in the area of home modification, design or construction, general or specific contracting, for any home construction or modification for the benefit of the Beneficiary, and to rely absolutely on, and bear no liability for, any professional advice, construction plans, and timeliness of completion or workmanship of any home modification or construction project provided by same; and

(12) To receive additions by way of gift, Will or otherwise, to any trust created hereunder, and to hold and administer the same under the provisions hereof;

(13) To merge any trust created hereunder with any other trust having substantially similar terms and beneficiaries, if in the judgment of the Trustee such a merger is advisable; and

(14) To decant any or all of the property of any trust established hereunder to one or more separate and different trusts for the benefit of any or all of the beneficiaries thereof, in equal or unequal shares as between or among them, upon such terms and conditions as the Trustee determines.[44]

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44. Decanting is not expressly authorized in the first-party d4A special needs trust, included in the written material provided by the same drafter. Although it would appear that neither the power nor its exercise should affect qualification of the trust, some Medicaid reviewers have taken the position that decanting could violate the payback requirement and sole benefit requirements in a first-party d4A trust. An added concern is whether a trust decanted to a new trust could be regarded as having terminated, which would accelerate the payback obligation.

(b) Notwithstanding the broad discretion and powers granted to the Trustee in this Trust Agreement, the Trustee shall, to the extent practicable, consult regularly with the Settlor, the Beneficiary, the Beneficiary's immediate family, and the Beneficiary's legal guardian, conservator or other legal representative, if any, regarding the investment of the property of the Trust, and shall be guided, but not bound, thereby.[45]

(c) In making distributions from any trust created hereunder to or for the benefit of any minor or other person (other than the Beneficiary of the Item V Trust established hereunder)[46] under a legal disability, the Trustee need not require the appointment of a guardian or conservator for such person, but may pay or deliver the same to the custodian of such person, including a custodian under the Transfers to Minors Act, or similar statute, of any jurisdiction, may pay or deliver the same to such person without the intervention of a guardian or conservator for such person, may pay or deliver the same to a legal guardian, conservator or other legal representative, of such person if one has already been appointed, or may use the same for the benefit of such person.

(d) In the distribution of the Trust and any division into separate trusts and shares, the Trustee shall be authorized to make the distribution and division in money or in kind or in both, regardless of the basis for income tax purposes of any property distributed or divided in kind, and the distribution and division made and the values established by the Trustee shall be binding and conclusive on all persons taking hereunder. The Trustee may, in making such distribution or division, allot undivided interests in the same property to several trusts or shares.

(e) The Trustee shall determine whether items should be charged or credited to income or principal or allocated between income and principal in accordance with the laws of the State wherein the Trust has its situs.

(f) Unless otherwise expressly directed hereunder, the Trustee may make any election or allocation permitted by any tax law, if in the opinion of the Trustee such election is for the combined best interest of the Trust and the beneficiaries thereof, and shall apportion taxes and adjustments between the parties or the several accounts in accordance with the laws of the State wherein the Trust has its situs.

(g) Any corporate Trustee serving hereunder shall have the following additional specific powers as to Trust property and may exercise the same in its sole and absolute discretion without court order or approval:[47]

(1) To engage any Affiliated Entity to render services to any Trust hereunder, including, without limitation:

(i) To manage or advise on the investments of the Trust on a discretionary or nondiscretionary basis.

(ii) To act as a broker or dealer to execute transactions, including the purchase of any securities currently distributed, underwritten or issued by an Affiliated Entity, at standard commission rates, markups or concessions, and to provide other management or investment services with respect to the Trust, including the custody of assets, and to pay for any such services from Trust property, with

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45. This consultation provision is not required in a special needs trust.

46. This third-party special needs trust need not comply with the d4A sole-beneficiary qualification requirement, meaning that the parenthetical in this paragraph need not apply. Distributions to any other beneficiaries would constitute available resources to the Beneficiary for purposes of eligibility for means-tested government benefits.

47. The provisions in (g) may be appropriate at the insistence of a corporate trustee that wishes to avoid any concerns about self-dealing. They are not necessary in a special needs trust, nor will they create a qualification problem.

appropriate reduction in the compensation paid to the Trustee for its services as Trustee, unless otherwise agreed in writing between the Trustee and the Settlor, the Beneficiary's legal guardian, conservator or other legal representative, if any.

(2) To invest in mutual funds offered by an Affiliated Entity or to which an Affiliated Entity may render services and from which an Affiliated Entity receives compensation.

(3) To cause or permit all or any part of any Trust hereunder to be held, maintained or managed in any jurisdiction, and to hold any Trust property in the name of its nominee or a nominee of any Affiliated Entity.

(h) The Trustee of any trust created hereunder may for tax, administrative or investment purposes, divide any trust established hereunder, based upon the fair market values of the trust property at the time of division, into two or more separate trusts, the dispositive provisions of which, except as otherwise expressly provided for herein, shall be identical to those applicable to the trust prior to division. The Trustee may also divide any transfer in trust provided for hereunder into fractional shares to which all, and none, respectively, of any person's remaining Generation-Skipping Transfer Tax exemption may be allocated, so as to create two separate trusts, the dispositive provisions of which, except as otherwise expressly provided herein, shall be identical to those which would have applied if such transfer had not been divided.

(i) The Trustee shall not be deemed to have accepted title to, and shall not act or be obligated to act in any way as a fiduciary with respect to, any real property, including any real property owned or operated by a sole proprietorship, general or limited partnership, limited liability company, or closely held corporation, or any interest in any such business enterprise, which is or may become an asset of the Trust until (i) at the election of the Trustee, an appropriate environmental audit is performed, at the expense of the Trust, to determine that conditions at such real property or operations conducted by such business enterprise are in compliance with state and federal environmental laws and regulations affecting such real property or such business enterprise, and (ii) the Trustee has accepted such property as an asset of the Trust by a separate writing delivered to the Settlor (or his designees), the Beneficiary and to the Beneficiary's legal guardian, conservator or other legal representative, if any, and to any Co-Trustee.

(j) Whenever the term "child," "children," "lineal descendant" or "lineal descendants" is used in this Trust Agreement, such reference shall be deemed to include any legally adopted child to the extent that it would include a natural child of the adopting parent, except that it shall exclude any person adopted after reaching majority age.[48] Whenever the term "minority" or "minor" is used herein, it shall refer to a person who has not yet attained twenty-one years of age.

(k) No party to any instrument in writing signed by the Trustee shall be obliged to inquire into its validity, or be bound to see to the application by the Trustee of any money or other

48. Most adult adoption provisions seek to preclude strategic efforts by an adopting parent to engineer devolution of a third party's estate. For example, the adult adoption provision in UPC §2-705(f) deals with such adoptions – by persons other than the transferor (which is what this provision should address) – by treating the adopted person as natural born only if adopted when under age 18, or if the adopting parent was a foster or step-parent, or if the adopting parent functioned as a parent when the adopted child was under age 18. This last aspect addresses the situation in which an adoption was precluded because a minor's natural parent refused to permit the adoption and thus precluded the adoption until after the adopted individual no longer required the natural parent's permission. The provision in this form has no such exceptions, which likely makes it too blunt an instrument for preventing abuse.

property paid or delivered to the Trustee by such party pursuant to the terms of any such instrument.

(l) All powers given to the Trustee by this Trust Agreement are exercisable by the Trustee only in a fiduciary capacity. Anything herein to the contrary notwithstanding, no power given to the Trustee hereunder shall be construed (i) to enable any person to purchase, exchange or otherwise deal with or dispose of the corpus or income of the Trustee for less than an adequate consideration in money or money's worth; (ii) to permit any person to borrow the income or corpus or the Trust directly or indirectly, or to authorize loans to any person, without adequate interest and adequate security; (iii) to allow any person other than the Trustee to vote or direct the voting of stock or other securities of the Trust; (iv) to allow any person to acquire the Trust corpus by substituting other property of an equivalent value; or (v) to authorize the Trustee to use any Trust property or the income therefrom to pay premiums on any insurance on the life of any person other than the Beneficiary.[49/]

(m) Except with respect to any trust established under Item V, if at any time the total fair market value of the assets of any other trust, created or to be created hereunder is an amount so small that the annual fee of any corporate Trustee named herein for administering the trust would be the minimum annual fee set forth in the Trustee's regularly published fee schedule then in effect, the Trustee may terminate such trust or decide not to create such trust, and in such event the property then held in or to be distributed to such trust shall be distributed to the persons who are then or would be entitled to the income of such trust.[50/] If the amount of income to be

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49. The intent of this provision is to guarantee that the trust is not taxable as an income tax grantor trust to the settlor nor to any other individual. As such all income, deductions, and credits would be taxable at the trust level, subject to the highest income tax brackets under §1(e) of the Internal Revenue Code. It may be possible to convert this trust into a pseudo-grantor trust, taxable under §678 to a particular beneficiary or group of beneficiaries, to take advantage of their lower income tax brackets. By way of example, the government's interpretation of §678 is that the lapsed Crummey powers in Item IV make this a grantor trust as to each powerholder. That result is likely unwelcome to those powerholders, because making income taxable to any individual who does not receive trust distributions may be an inappropriate imposition. As a result, the income taxation of the trust is a matter that deserves careful consideration and may not be as straightforward as the prohibitions in this provision intend for it to be.

50. Although this "small trust termination" provision could apply in any first-party or third-party special needs trust, in the d4 first-party variety it would accelerate the payback distribution to the state or the pooled trust administrator, which makes it undesirable. Here it could apply even to the Item V trust, but the notion is that even a small trust should continue to be held for the Beneficiary of that fund because an outright distribution of more than $2,000 would disqualify a beneficiary who receives means-tested government benefits.

    The sentence authorizing the trustee to decide how to distribute "in such proportions as the Trustee shall determine" might expose the trustee to challenge by a beneficiary who is not treated "fairly," such that a cautious fiduciary likely would distribute in equal or, in a multi-generational class, on a per stirpes basis. As a result, most provisions of this ilk would protect the trustee by calling for just that form of distribution if the rights of the income beneficiaries are only discretionary. The following sample provision also incorporates added triggers relating to termination of any program of public benefits that made the trust appropriate in the first instance:

    > The trustee in its discretion may terminate and distribute any trust hereunder if the trustee determines that the costs of continuance thereof will substantially impair accomplishment of the purposes of the trust. Distribution under this provision shall be made to the persons then entitled to receive or have the benefit of the income from the trust in the proportions in which they are entitled thereto or, if their interests are

received by such persons is to be determined in the discretion of the Trustee of such trust, then the Trustee shall distribute the property among such of the persons to whom the Trustee is authorized to distribute income, and in such proportions, as the Trustee shall determine. With respect to any trust established under Item V, the Trustee may establish, and fund, an account for the Beneficiary thereof at the _____ Community Trust, a pooled special needs trust under 42 U.S.C. §1396p(d)(4)(C), or similar pooled investment vehicle which allows disabled persons to maintain their eligibility for means-tested benefits for which they would otherwise be eligible was a result of those disabilities, upon such uses and trusts as the Trustee deems advisable under all of the circumstances.

ITEM IX: SPENDTHRIFT PROVISION[51/]

The Trust governed by the provisions of Item V of this Trust Agreement is a purely discretionary, non-support spendthrift trust. Neither the Beneficiary thereof, nor any creditor of such Beneficiary, may compel any distributions from such Trust. The interest of the Beneficiary shall not be transferred, assigned or conveyed, voluntarily or involuntarily, and shall not be subject to the claims of any creditors of the Beneficiary, or of any local, state or federal governments or agencies, or of any private agencies, and shall not be subject to any legal or equitable process. The Trustee shall continue distributing Trust property directly to, or for the benefit of, the Beneficiary, as provided for herein, notwithstanding any voluntary or involuntary transfer, assignment or conveyance, or action by creditors, governments or agencies. If the Trustee is prevented by any such transfer, assignment or conveyance, or by any bankruptcy, receivership or other proceeding, from distributing property of the Trust directly to, or for the benefit of, the Beneficiary, the Trustee shall hold and accumulate the property which would otherwise have been distributed until the Trustee is able to distribute such property directly to, or for the benefit of, the Beneficiary, or until the death of the Beneficiary, whichever first occurs; and upon the death of the Beneficiary, any such property so held and accumulated shall become a part of the principal of the Trust and shall be disposed of as provided for the principal. The Trustee is authorized[52/] to defend, at the expense of the Trust,[53/] any challenge to this, or any other, provision of this Trust Agreement, or any attack of any nature on the property of the Trust.

ITEM X: ACCEPTANCE OF TRUST

By the execution of this Trust Agreement, the Trustee acknowledges the receipt of the property described on Exhibit A attached hereto, and acknowledges and accepts the trust hereby created upon all of the terms set forth herein.

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indefinite, then in equal shares. In no event shall the trustee exercise this authority if doing so would cause termination of a beneficiary's entitlement to public benefits, nor may the trustee be compelled to exercise this authority.

Some trust documents combine this provision with the Perpetuities Saving Clause because the distribution typically is the same.

51. POMS SI 01120.200.D.1 and 01120.200.D.2 only require inclusion of a spendthrift provision that is valid under state law.

52. Some trusts direct the trustee to defend against such challenges, as a more forceful means of establishing the settlor's intent and, presumably, also to present a more formidable threat to any challenger. This probably is not a good idea unless a very substantial trust is involved.

53. Particularly because the trust corpus may be consumed if a challenge is not successful, this compensation for any extraordinary administration or legal and accounting fees incurred is essential to ensure that the trustee will mount an appropriate challenge.

ITEM XI: GOVERNING LAW AND TRUST SITUS

The validity of the Trust shall be determined in accordance with the laws of the State of _____.[54] This Trust Agreement shall be construed and administered in accordance with the laws of the State of _____, and any relevant laws of the United States, including any valid regulations promulgated under such laws. Although the initial situs of this Trust shall be the State of _____, the Trustee may, from time to time, in the Trustee's sole discretion, change the situs of the Trust to another jurisdiction, and the laws of such new situs shall thereafter govern the administration of this Trust, but the laws of _____ shall continue to govern the construction of the Trust and the rights of the beneficiaries of the Trust. Any contrary provisions of this Trust Agreement notwithstanding, any judicial action regarding the administration of the Trust shall be brought in the _____ Court (or other court of equity) of the County in which the Beneficiary is domiciled at the time such action is filed. The Trustee hereby specifically agrees to submit to the *in personam* jurisdiction of said Court for such purpose, including, but not limited to, acceptance of service of process (including service via Certified Mail, if necessary) and appearance before said Court.

IN WITNESS WHEREOF, each of the parties hereto has hereunto set his or her, as of the day and year first above written.

SETTLOR:

_____

ROBERT WILLIAM SMITH

Signed and delivered this _____ day of _____, 2012 in the presence of

Notary
My Commission Expires

[SEAL]

_____
Witness

_____
Witness

_____
Witness

TRUSTEE:

_____

SHARON SMITH LANE

54. Trust law would recognize the selection of the law of any state with respect to which the trust has any reasonable connection – this need not be the state of trust administration or creation, although usually it is (so that the trustee is not obliged to learn or apply the law of another jurisdiction). Note, however, that the designation here could be the law of the state in which the trust currently is being administered, such that "decanting" the trust or moving the situs (pursuant to the power granted in Item VIII(a)(14) at page 20) can alter the governing law (to acquire benefits or dodge detriments of a particular jurisdiction's law).

Signed and delivered this _____ day of _____, 2012 in the presence of

Notary
My Commission Expires

[SEAL]

_____
Witness

_____
Witness

_____
Witness

EXHIBIT "A"

SPECIAL NEEDS TRUST FOR THE PRIMARY BENEFIT OF THOMAS CHARLES SMITH

Assets Received by SHARON SMITH LANE, Trustee: $10.00 Cash

NOTES

NOTES

Elder Life Care Planning in Estate Planning

[redacted]

Objectives

- Understand how a Nurse Life Care Planner

- Assess Needs of Elder for Advance Directives

- Discuss Special Need Trusts

- Assess Needs and Goals of Elder Client

- Support Individual Family

What is Life Care?

- Life – current and future

- Care – services & services including medical, nursing, nonlicensed caregivers, therapy, ancillary professionals, patient and family education and support, environmental supports, supplies & equipment

- Plans and guides resources

Identify those evaluations and interventions that support

- Health maintenance
- Health promotion
- Optimization of physical and psychological abilities for the life expectancy of the individual

History of LCP'ing

Work Comp & Litigation

Broadened application to multiple settings

Nurse Life Care Planner

Patient and family advocate

Clinical expertise

Understanding of payment sources

Clinical resources

- Vaccine cases
- Estate Planning
- Special Needs Trusts
- Divorce
- Complex rehabilitation discharge planning
- Complex utilization review
- Independent nursing assessments
- Lien investigations
- Medical cost projections
- Medicare set-aside arrangements
- Reasonableness of past medical bills
- Setting insurance reserves

Body of Knowledge

- Care/case management principles
- Rehabilitation
- Changing care needs across the lifespan
- Epidemiology
- Morbidity and mortality
- Disability
- Healthcare trends
- Insurance and funding
- Legal issues

Attorneys and Guardians

Guide in complex care situations, across the life span – from a young child with a TBI to a senior with dementia or a young person with a traumatic brain injury.

The Nurse Life Care Planner /Case Manager's expertise and resources can save time, money, and stress.

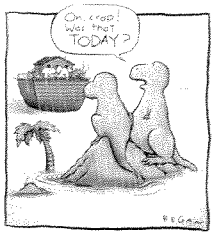
Attorneys and Guardians

- Plan for and manage healthcare costs for safe, quality cost effective care and wise use of trust funds
- Testify
- Summarize medical care and safety issues
- Level of care needs and costs

Process

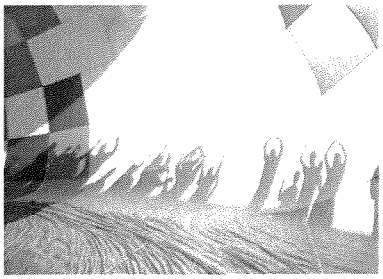
- Assessment
- Develop LCP, collaborating with treatment team and medical providers
- Implementation as case managers
- Advocate in hospital and facility settings to manage crises and provide transitional care
- Educate family and guardians on prognoses and provide valuable information to make good care decisions.
- Coordinate care with a proactive approach to address complex physical and psychological care needs
- Mediate difficult family dynamics to facilitate good communication and honor our client's wishes.
- Be the single point of contact between the individual/family and providers

Who needs a LCP'er or case manager ?



Medicare, Insurance & AHA

- No "custodial care"
- Equipment
- Therapy limitations
- Specialized long-term care
- Recommend less expensive yet clinically equal medications



Vetting a LPC'er

- Nurses
- Vocational Rehab Specialists
- OT, PT

Clinical background
Licensure & Scope of Practice

NOTES

NOTES

2016 Legislative Update

Johanna A. Pickel, LLC
4801 Lang Ave N.E., Suite 110
Albuquerque, New Mexico
(505) 798-2515

The New Mexico Uniform Trust Decanting Act

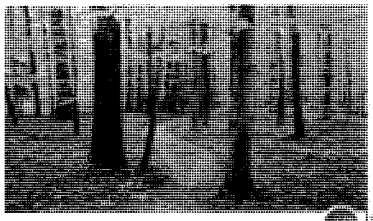
Staged adoption of the Act:

- July 2016 effective provisions
- January 2017 effective provisions

What is decanting, anyway??

Johanna Pickel

Decanting: A history

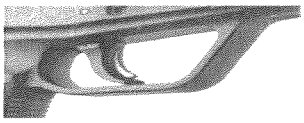


Johanna Pickel

To decant, or not to decant?

- When is decanting possible?
- When is decanting barred?
- When is decanting desirable?

Johanna Pickel



Trigger alert!

- When decanting may trigger a taxable event
- Decanting and Medicaid (*Simonsen*)

Johanna Dickel

Considerations:

The New Mexico Uniform Trust Decanting Act and Special Needs Trusts

Johanna Dickel

The New Mexico Uniform Powers of Appointment Act

Johanna Dickel

Staged adoption of the Act:

- July 2016 effective provisions
- January 2017 effective provisions

Proposed S. Court Rules Changes:

- Cover sheets in guardianship & conservatorship cases (NMRA 1-003.2)
- Courtroom closure in guardianship & conservatorship hearings (NMRA 1-104)

AN ACT

RELATING TO PROPERTY; ENACTING THE UNIFORM TRUST DECANTING ACT; REVISING THE STATUTORY RULE AGAINST PERPETUITIES AS IT AFFECTS PROPERTY INTERESTS, INCLUDING REAL PROPERTY INTERESTS, HELD IN TRUST.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

UNIFORM TRUST DECANTING ACT

SECTION 1-101. SHORT TITLE.--Sections 1-101 through 1-129 of this act may be cited as the "Uniform Trust Decanting Act".

SECTION 1-102. DEFINITIONS.--As used in the Uniform Trust Decanting Act:

A. "appointive property" means the property or property interest subject to a power of appointment;

B. "ascertainable standard" means a standard relating to an individual's health, education, support or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, and any applicable regulations;

C. "authorized fiduciary" means:

(1) a trustee or other fiduciary, other than a settlor, that has discretion to distribute, or direct a trustee to distribute, part or all of the principal of the first trust to one or more current beneficiaries;

(2) a special fiduciary appointed under Section 1-109 of the Uniform Trust Decanting Act; or

(3) a special-needs fiduciary under Section 1-113 of the Uniform Trust Decanting Act;

D. "beneficiary" means a person that:

(1) has a present or future, vested or contingent, beneficial interest in a trust;

(2) holds a power of appointment over trust property; or

(3) is an identified charitable organization that will or may receive distributions under the terms of the trust;

E. "charitable interest" means an interest in a trust that:

(1) is held by an identified charitable organization and makes the organization a qualified beneficiary;

(2) benefits only charitable organizations and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary; or

(3) is held solely for charitable purposes and, if the interest were held by an identified charitable organization, would make the organization a qualified beneficiary;

F. "charitable organization" means:

(1) a person, other than an individual, organized and operated exclusively for charitable purposes; or

(2) a government or governmental subdivision, agency or instrumentality, to the extent it holds funds exclusively for a charitable purpose;

G. "charitable purpose" means the relief of poverty, the advancement of education or religion, the promotion of health, a municipal or other governmental purpose or another purpose the achievement of which is beneficial to the community;

H. "court" means the district court;

I. "current beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal. "Current beneficiary":

(1) includes the holder of a presently exercisable general power of appointment; and

(2) does not include a person that is a beneficiary only because the person holds any other power of appointment;

J. "decanting power" or "the decanting power" means the power of an authorized fiduciary under the Uniform Trust Decanting Act to distribute property of a first trust

to one or more second trusts or to modify the terms of the first trust;

K. "expanded distributive discretion" means a discretionary power of distribution that is not limited to an ascertainable standard or a reasonably definite standard;

L. "first trust" means a trust over which an authorized fiduciary may exercise the decanting power;

M. "first-trust instrument" means the trust instrument for a first trust;

N. "general power of appointment" means a power of appointment exercisable in favor of a powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate;

O. "jurisdiction", with respect to a geographic area, includes a state or country;

P. "person" means an individual; an estate; a business or nonprofit entity; a public corporation; a government or governmental subdivision, agency or instrumentality; or another legal entity;

Q. "power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. "Power of appointment" does not include a power of attorney;

R. "powerholder" means a person in which a donor

creates a power of appointment;

S. "presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. "Presently exercisable power of appointment":

(1) includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death;

T. "qualified beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined:

(1) is a distributee or permissible distributee of trust income or principal;

(2) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in Paragraph (1) of this

subsection terminated on that date without causing the trust to terminate; or

(3) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date;

U. "reasonably definite standard" means a clearly measurable standard under which a holder of a power of distribution is legally accountable within the meaning of 26 U.S.C. Section 674(b)(5)(A), as amended, and any applicable regulations;

V. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

W. "second trust" means:

(1) a first trust after modification under the Uniform Trust Decanting Act; or

(2) a trust to which a distribution of property from a first trust is or may be made under the Uniform Trust Decanting Act;

X. "second-trust instrument" means the trust instrument for a second trust;

Y. "settlor", except as otherwise provided in Section 1-125 of the Uniform Trust Decanting Act, means a person, including a testator, that creates or contributes property to a trust. If more than one person creates or

contributes property to a trust, each person is a settlor of the portion of the trust property attributable to the person's contribution except to the extent that another person has power to revoke or withdraw that portion;

Z. "sign" means, with present intent to authenticate or adopt a record:

(1) to execute or adopt a tangible symbol; or

(2) to attach to or logically associate with the record an electronic symbol, sound or process;

AA. "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States. "State" includes an Indian tribe, pueblo, nation or band located within the United States and recognized by federal law or formally acknowledged by a state of the United States;

BB. "terms of the trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument, as may be established by other evidence that would be admissible in a judicial proceeding or as may be established by court order or nonjudicial settlement agreement; and

CC. "trust instrument" means a record executed by the settlor to create a trust or by any person to create a

second trust that contains some or all of the terms of the trust, including any amendments.

SECTION 1-103. SCOPE.--

A. Except as otherwise provided in Subsections B and C of this section, the Uniform Trust Decanting Act applies to an express trust that is irrevocable or revocable by the settlor only with the consent of the trustee or a person holding an adverse interest.

B. The Uniform Trust Decanting Act does not apply to a trust held solely for charitable purposes.

C. Subject to Section 1-115 of the Uniform Trust Decanting Act, a trust instrument may restrict or prohibit exercise of the decanting power.

D. The Uniform Trust Decanting Act does not limit the power of a trustee, powerholder or other person to distribute or appoint property in further trust or to modify a trust under the trust instrument, New Mexico law other than the Uniform Trust Decanting Act, common law, a court order or a nonjudicial-settlement agreement.

E. The Uniform Trust Decanting Act does not affect the ability of a settlor to provide in a trust instrument for the distribution of the trust property or appointment in further trust of the trust property or for modification of the trust instrument.

SECTION 1-104. FIDUCIARY DUTY.--

A. In exercising the decanting power, an authorized fiduciary shall act in accordance with its fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

B. The Uniform Trust Decanting Act does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of the Uniform Trust Decanting Act.

C. Except as otherwise provided in a first-trust instrument, the terms of the first trust are, for purposes of the Uniform Trust Decanting Act, Section 46A-8-801 NMSA 1978 and Subsection A of Section 46A-8-802 NMSA 1978, deemed to include the decanting power.

SECTION 1-105. APPLICATION--GOVERNING LAW.--

A. The Uniform Trust Decanting Act applies to a trust that:

(1) has its principal place of administration in New Mexico, including a trust whose principal place of administration has been changed to New Mexico; or

(2) provides by its trust instrument that it is governed by New Mexico law or is governed by New Mexico law for the purpose of:

(a) administration, including administration of a trust whose governing law for purposes of

administration has been changed to New Mexico law;

(b) construction of terms of the trust; or

(c) determining the meaning or effect of terms of the trust.

B. Except as otherwise provided in the Uniform Trust Decanting Act, on and after January 1, 2017:

(1) the Uniform Trust Decanting Act applies to a trust created before, on or after January 1, 2017;

(2) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced on or after January 1, 2017;

(3) the Uniform Trust Decanting Act applies to a judicial proceeding concerning a trust commenced before January 1, 2017 unless the court finds that application of a particular provision of the Uniform Trust Decanting Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Trust Decanting Act does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in the Uniform Trust Decanting Act applies to a trust instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) except as otherwise provided in Paragraphs (1) through (4) of this subsection, an action done before January 1, 2017 is not affected by the Uniform Trust Decanting Act.

C. If a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the Uniform Trust Decanting Act before January 1, 2017, the law continues to apply to the right.

SECTION 1-106. REASONABLE RELIANCE.--A trustee or other person that reasonably relies on the validity of a distribution of part or all of the property of a trust to another trust, or a modification of a trust under the Uniform Trust Decanting Act, New Mexico law other than the Uniform Trust Decanting Act or the law of another jurisdiction, is not liable to any person for any action or failure to act as a result of the reliance.

SECTION 1-107. NOTICE--EXERCISE OF DECANTING POWER.--

A. In this section, a notice period begins on the day notice is given under Subsection C of this section and ends fifty-nine days after the day notice is given.

B. Except as otherwise provided in the Uniform Trust Decanting Act, an authorized fiduciary may exercise the decanting power without the consent of any person and without court approval.

C. Except as otherwise provided in Subsection F of this section, an authorized fiduciary shall give notice in a record of the intended exercise of the decanting power not later than sixty days before the exercise to:

(1) each settlor of the first trust, if living or then in existence;

(2) each qualified beneficiary of the first trust;

(3) each holder of a presently exercisable power of appointment over any part or all of the first trust;

(4) each person that currently has the right to remove or replace the authorized fiduciary;

(5) each other fiduciary of the first trust;

(6) each fiduciary of the second trust; and

(7) the attorney general, if Subsection B of Section 1-114 of the Uniform Trust Decanting Act applies.

D. An authorized fiduciary is not required to give notice under Subsection C of this section to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence.

E. A notice given under Subsection C of this section shall:

(1) specify the manner in which the authorized fiduciary intends to exercise the decanting power;

(2) specify the proposed effective date for exercise of the power;

(3) include a copy of the first-trust instrument; and

(4) include a copy of all second-trust instruments.

F. The decanting power may be exercised before expiration of the notice period specified in Subsection A of this section if all persons entitled to receive notice waive the period in a signed record.

G. The receipt of notice, waiver of the notice period or expiration of the notice period does not affect the right of a person to file an application under Section 1-109 of the Uniform Trust Decanting Act asserting that:

(1) an attempted exercise of the decanting power is ineffective because it did not comply with the Uniform Trust Decanting Act or was an abuse of discretion or breach of fiduciary duty; or

(2) Section 1-122 of the Uniform Trust Decanting Act applies to the exercise of the decanting power.

H. An exercise of the decanting power is not ineffective because of the failure to give notice to one or more persons under Subsection C of this section if the authorized fiduciary acted with reasonable care to comply with that subsection.

SECTION 1-108. REPRESENTATION.--

A. Notice to a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code has the same effect as notice given directly to the person represented.

B. Consent of or waiver by a person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code is binding on the person represented unless the person represented objects to the representation before the consent or waiver otherwise would become effective.

C. A person with authority to represent and bind another person under a first-trust instrument or the Uniform Trust Code may file an application under Section 1-109 of the Uniform Trust Decanting Act on behalf of the person represented.

D. A settlor shall not represent or bind a beneficiary under the Uniform Trust Decanting Act.

SECTION 1-109. COURT INVOLVEMENT.--

A. On application of an authorized fiduciary, a person entitled to notice under Subsection C of Section 1-107 of the Uniform Trust Decanting Act, a beneficiary or, with respect to a charitable interest, the attorney general or other person that has standing to enforce the charitable interest, the court, may:

(1) provide instructions to the authorized fiduciary regarding whether a proposed exercise of the decanting power is permitted under the Uniform Trust Decanting Act and consistent with the fiduciary duties of the authorized fiduciary;

(2) appoint a special fiduciary and authorize the special fiduciary to determine whether the decanting power should be exercised under the Uniform Trust Decanting Act and to exercise the decanting power;

(3) approve an exercise of the decanting power;

(4) determine that a proposed or attempted exercise of the decanting power is ineffective because:

(a) after applying Section 1-122 of the Uniform Trust Decanting Act, the proposed or attempted exercise does not or did not comply with the Uniform Trust Decanting Act; or

(b) the proposed or attempted exercise would be or was an abuse of the fiduciary's discretion or a breach of fiduciary duty;

(5) determine the extent to which Section 1-122 of the Uniform Trust Decanting Act applies to a prior exercise of the decanting power;

(6) provide instructions to the trustee regarding the application of Section 1-122 of the Uniform

Trust Decanting Act to a prior exercise of the decanting power; or

(7) order other relief to carry out the purposes of the Uniform Trust Decanting Act.

B. On application of an authorized fiduciary, the court may approve:

(1) an increase in the fiduciary's compensation under Section 1-116 of the Uniform Trust Decanting Act; or

(2) a modification under Section 1-118 of the Uniform Trust Decanting Act of a provision granting a person the right to remove or replace the fiduciary.

SECTION 1-110. FORMALITIES.--An exercise of the decanting power shall be made in a record signed by an authorized fiduciary. The signed record shall, directly or by reference to the notice required by Section 1-107 of the Uniform Trust Decanting Act, identify the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust and the property, if any, that remains in the first trust.

SECTION 1-111. DECANTING POWER UNDER EXPANDED DISTRIBUTIVE DISCRETION.--

A. As used in this section:

(1) "noncontingent right" means a right that is not subject to the exercise of discretion or the

occurrence of a specified event that is not certain to occur. "Noncontingent right" does not include a right held by a beneficiary if any person has discretion to distribute property subject to the right to any person other than the beneficiary or the beneficiary's estate;

(2) "presumptive remainder beneficiary" means a qualified beneficiary other than a current beneficiary;

(3) "successor beneficiary" means a beneficiary that is not a qualified beneficiary on the date the beneficiary's qualification is determined. "Successor beneficiary" does not include a person that is a beneficiary only because the person holds a nongeneral power of appointment; and

(4) "vested interest" means:

(a) a right to a mandatory distribution that is a noncontingent right as of the date of the exercise of the decanting power;

(b) a current and noncontingent right, annually or more frequently, to a mandatory distribution of income, a specified dollar amount or a percentage of value of some or all of the trust property;

(c) a current and noncontingent right, annually or more frequently, to withdraw income, a specified dollar amount or a percentage of value of some or all of the

trust property;

(d) a presently exercisable general power of appointment; or

(e) a right to receive an ascertainable part of the trust property on the trust's termination that is not subject to the exercise of discretion or to the occurrence of a specified event that is not certain to occur.

B. Subject to Subsection C of this section and Section 1-114 of the Uniform Trust Decanting Act, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

C. Subject to Section 1-113 of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust shall not:

(1) include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in Subsection D of this section;

(2) include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary or successor beneficiary of the first trust, except as otherwise provided in Subsection D of this section; or

(3) reduce or eliminate a vested interest.

D. Subject to Paragraph (3) of Subsection C of this section and Section 1-114 of the Uniform Trust Decanting Act, in an exercise of the decanting power under this section, a second trust may be a trust created or administered under the law of any jurisdiction and may:

(1) retain a power of appointment granted in the first trust;

(2) omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

(3) create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

(4) create or modify a power of appointment if the powerholder is a presumptive remainder beneficiary or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

E. A power of appointment described in Paragraphs (1) through (4) of Subsection D of this section may be general or nongeneral. The class of permissible appointees in favor of which the power may be exercised may be broader than or different from the beneficiaries of the first trust.

F. If an authorized fiduciary has expanded

distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power under this section over that part of the principal over which the authorized fiduciary has expanded distributive discretion.

SECTION 1-112. DECANTING POWER UNDER LIMITED DISTRIBUTIVE DISCRETION.--

A. As used in this section, "limited distributive discretion" means a discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

B. An authorized fiduciary that has limited distributive discretion over the principal of the first trust for benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

C. Under this section and subject to Section 1-114 of the Uniform Trust Decanting Act, a second trust may be created or administered under the law of any jurisdiction. Under this section, the second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests that are substantially similar to the beneficial interests of the beneficiary in the first trust.

D. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to

make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

(1) the distribution is applied for the benefit of the beneficiary;

(2) the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated and the distribution is made as permitted under the Uniform Trust Code; or

(3) the distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the benefit of the beneficiary.

E. If an authorized fiduciary has limited distributive discretion over part but not all of the principal of a first trust, the fiduciary may exercise the decanting power provided by this section over that part of the principal over which the authorized fiduciary has limited distributive discretion.

SECTION 1-113. TRUST FOR BENEFICIARY WITH DISABILITY.--

A. As used in this section:

(1) "beneficiary with a disability" means a beneficiary of a first trust who the special-needs fiduciary believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incapacitated;

(2) "governmental benefits" means financial aid or services from a state, federal or other type of public agency;

(3) "special-needs fiduciary" means, with respect to a trust that has a beneficiary with a disability:

(a) a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the principal of a first trust to one or more current beneficiaries;

(b) if no trustee or fiduciary has discretion under Subparagraph (a) of this paragraph, a trustee or other fiduciary, other than a settlor, that has discretion to distribute part or all of the income of the first trust to one or more current beneficiaries; or

(c) if no trustee or fiduciary has discretion under Subparagraphs (a) and (b) of this paragraph, a trustee or other fiduciary, other than a settlor, that is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries; and

(4) "special-needs trust" means a trust that the trustee believes would not be considered a resource for purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

B. A special-needs fiduciary may exercise the decanting power provided by Section 1-111 of the Uniform

Trust Decanting Act over the principal of a first trust as if the fiduciary had authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

(1) a second trust is a special-needs trust that benefits the beneficiary with a disability; and

(2) the special-needs fiduciary determines that exercise of the decanting power will further the purposes of the first trust.

C. In an exercise of the decanting power provided by this section, the following rules apply:

(1) notwithstanding Paragraph (2) of Subsection C of Section 1-111 of the Uniform Trust Decanting Act, the interest in the second trust of a beneficiary with a disability may:

(a) be a pooled trust as defined by medicaid law for the benefit of the beneficiary with a disability under 42 U.S.C. Section 1396p(d)(4)(C), as amended; or

(b) contain payback provisions complying with reimbursement requirements of medicaid law under 42 U.S.C. Section 1396p(d)(4)(A), as amended;

(2) Paragraph (3) of Subsection C of Section 1-111 of the Uniform Trust Decanting Act does not apply to the interests of the beneficiary with a disability; and

(3) except as affected by any change to the interests of the beneficiary with a disability, the second trust, or if there are two or more second trusts, the second trusts in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's beneficial interests in the first trust.

SECTION 1-114. PROTECTION OF CHARITABLE INTEREST.--

A. As used in this section:

(1) "determinable charitable interest" means a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event or after the passage of a specified time and that is unconditional or will be held solely for charitable purposes; and

(2) "unconditional" means not subject to the occurrence of a specified event that is not certain to occur, other than a requirement in a trust instrument that a charitable organization be in existence or qualify under a particular provision of the United States Internal Revenue Code of 1986, as amended, on the date of the distribution if the charitable organization meets the requirement on the date of determination.

B. If a first trust contains a determinable charitable interest, the attorney general has the rights of a

qualified beneficiary and may represent and bind the charitable interest.

C. If a first trust contains a charitable interest, the second trust or trusts shall not:

(1) diminish the charitable interest;

(2) diminish the interest of an identified charitable organization that holds the charitable interest;

(3) alter any charitable purpose stated in the first-trust instrument; or

(4) alter any condition or restriction related to the charitable interest.

D. If there are two or more second trusts, the second trusts shall be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of Subsection C of this section.

E. If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to Subsection C of this section shall be administered under New Mexico law unless:

(1) the attorney general, after receiving notice under Section 1-107 of the Uniform Trust Decanting Act, fails to object in a signed record delivered to the authorized fiduciary within the notice period;

(2) the attorney general consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or

(3) the court approves the exercise of the decanting power.

F. The Uniform Trust Decanting Act does not limit the powers and duties of the attorney general under New Mexico law other than that act.

SECTION 1-115. TRUST LIMITATION ON DECANTING.--

A. An authorized fiduciary shall not exercise the decanting power to the extent that the first-trust instrument expressly prohibits exercise of:

(1) the decanting power; or

(2) a power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust.

B. Exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

(1) the decanting power; or

(2) a power granted by state law to a fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

C. A general prohibition of the amendment or revocation of a first trust, a spendthrift clause or a clause

restraining the voluntary or involuntary transfer of a beneficiary's interest does not preclude exercise of the decanting power.

D. Subject to Subsections A and B of this section, an authorized fiduciary may exercise the decanting power provided by the Uniform Trust Decanting Act even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

E. If a first-trust instrument contains an express prohibition described in Subsection A of this section or an express restriction described in Subsection B of this section, the provision shall be included in the second-trust instrument.

SECTION 1-116. CHANGE IN COMPENSATION.--

A. If a first-trust instrument specifies an authorized fiduciary's compensation, the fiduciary shall not exercise the decanting power to increase the fiduciary's compensation above the specified compensation unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

B. If a first-trust instrument does not specify an authorized fiduciary's compensation, the fiduciary shall not

exercise the decanting power to increase the fiduciary's compensation above the compensation permitted by the Uniform Trust Code unless:

(1) all qualified beneficiaries of the second trust consent to the increase in a signed record; or

(2) the increase is approved by the court.

C. A change in an authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of Subsections A and B of this section.

SECTION 1-117. RELIEF FROM LIABILITY AND INDEMNIFICATION.--

A. Except as otherwise provided in this section, a second-trust instrument shall not relieve an authorized fiduciary from liability for breach of trust to a greater extent than the first-trust instrument.

B. A second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

C. A second-trust instrument shall not reduce fiduciary liability in the aggregate.

D. Subject to Subsection C of this section, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by New Mexico law other than the Uniform Trust Decanting Act.

SECTION 1-118. REMOVAL OR REPLACEMENT OF AUTHORIZED FIDUCIARY.--An authorized fiduciary shall not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless:

A. the person holding the power consents to the modification in a signed record and the modification applies only to the person;

B. the person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

C. the court approves the modification and the modification grants a substantially similar power to another person.

SECTION 1-119. TAX-RELATED LIMITATIONS.--

A. As used in this section:

(1) "grantor trust" means a trust as to

which a settlor of a first trust is considered the owner under 26 U.S.C. Sections 671 through 677, as amended, or 26 U.S.C. Section 679, as amended;

(2) "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended;

(3) "nongrantor trust" means a trust that is not a grantor trust; and

(4) "qualified benefits property" means property subject to the minimum distribution requirements of 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or subject to any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended or the regulations.

B. An exercise of the decanting power is subject to the following limitations:

(1) if a first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a marital deduction for purposes of the gift or estate tax under the Internal Revenue Code or a state gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the

amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;

(2) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for a charitable deduction for purposes of the income, gift or estate tax under the Internal Revenue Code or a state income, gift, estate or inheritance tax, the second-trust instrument shall not include or omit any term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying for the deduction, or would have reduced the amount of the deduction, under the same provisions of the Internal Revenue Code or state law under which the transfer qualified;

(3) if the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(b), as

amended. If the first trust contains property that qualified, or would have qualified but for provisions of the Uniform Trust Decanting Act other than those in this section, for the exclusion from the gift tax described in 26 U.S.C. Section 2503(b), as amended, by application of 26 U.S.C. Section 2503(c), as amended, the second-trust instrument shall not include or omit a term that, if included or omitted from the trust instrument for the trust to which the property was transferred, would have prevented the transfer from qualifying under 26 U.S.C. Section 2503(c), as amended;

(4) if the property of the first trust includes shares of stock in an S corporation, as defined in 26 U.S.C. Section 1361, as amended, and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a permitted shareholder under any provision of 26 U.S.C. Section 1361, as amended, an authorized fiduciary may exercise the power with respect to part or all of the S-corporation stock only if any second trust receiving the stock is a permitted shareholder under 26 U.S.C. Section 1361(c)(2), as amended. If the property of the first trust includes shares of stock in an S corporation and the first trust is, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would be, a qualified subchapter-S trust within the meaning of 26 U.S.C. Section 1361(d), as amended, the

second-trust instrument shall not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust;

(5) if the first trust contains property that qualified, or, but for provisions of the Uniform Trust Decanting Act other than those in this section, would have qualified, for a zero inclusion ratio for purposes of the generation-skipping transfer tax under 26 U.S.C. Section 2642(c), as amended, the second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the transfer to the first trust from qualifying for a zero inclusion ratio under 26 U.S.C. Section 2642(c), as amended;

(6) if the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument shall not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required with respect to the qualified benefits property under 26 U.S.C. Section 401(a)(9), as amended, and any applicable regulations or any similar requirements that refer to 26 U.S.C. Section 401(a)(9), as amended, or the regulations. If an attempted exercise of the decanting power violates this paragraph, the trustee is deemed to have held the qualified benefits property and any reinvested

distributions of the property as a separate share from the date of the exercise of the power, and Section 1-122 of the Uniform Trust Decanting Act applies to the separate share;

(7) if the first trust qualifies as a grantor trust because of the application of 26 U.S.C. Section 672(f)(2)(A), as amended, the second trust shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under 26 U.S.C. Section 672(f)(2)(A), as amended;

(8) as used in this paragraph, "tax benefit" means a federal or state tax deduction, exemption, exclusion or other benefit not otherwise listed in this section, except for a benefit arising from being a grantor trust. Subject to Paragraph (9) of this subsection, a second-trust instrument shall not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if:

(a) the first-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

(b) the transfer of property held by the first trust or the first trust qualified, or, but for provisions of the Uniform Trust Decanting Act other than

those in this section, would have qualified, for the tax benefit;

(9) subject to Paragraph (4) of this subsection:

(a) except as otherwise provided in Paragraph (7) of this subsection, the second trust may be a nongrantor trust, even if the first trust is a grantor trust; and

(b) except as otherwise provided in Paragraph (10) of this subsection, the second trust may be a grantor trust, even if the first trust is a nongrantor trust; and

(10) an authorized fiduciary shall not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

(a) the first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the second trust to cease to be a grantor trust and the second trust does not grant an equivalent power to the settlor or other person; or

(b) the first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless: 1) the settlor

has the power at all times to cause the second trust to cease to be a grantor trust; or 2) the first-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains the same provision.

SECTION 1-120. DURATION OF SECOND TRUST.--

A. Subject to Subsection B of this section, a second trust may have a duration that is the same as or different from the duration of the first trust.

B. To the extent that property of a second trust is attributable to property of the first trust, the property of the second trust is subject to any maximum perpetuity, accumulation or suspension-of-the-power-of-alienation rules that apply to property of the first trust.

SECTION 1-121. NEED TO DISTRIBUTE NOT REQUIRED.--An authorized fiduciary may exercise the decanting power regardless of whether under the first trust's discretionary distribution standard the fiduciary would have made, or could have been compelled to make, a discretionary distribution of principal at the time of the exercise.

SECTION 1-122. SAVING PROVISION.--

A. If exercise of the decanting power would be effective under the Uniform Trust Decanting Act except that the second-trust instrument in part does not comply with the

Uniform Trust Decanting Act, the exercise of the power is effective and the following rules apply with respect to the principal of the second trust attributable to the exercise of the power:

(1) a provision in the second-trust instrument that is not permitted under the Uniform Trust Decanting Act is void to the extent necessary to comply with the Uniform Trust Decanting Act; and

(2) a provision required by the Uniform Trust Decanting Act to be in the second-trust instrument that is not contained in the instrument is deemed to be included in the instrument to the extent necessary to comply with the Uniform Trust Decanting Act.

B. If a trustee or other fiduciary of a second trust determines that Subsection A of this section applies to a prior exercise of the decanting power, the fiduciary shall take corrective action consistent with the fiduciary's duties.

SECTION 1-123. TRUST FOR CARE OF ANIMAL.--

A. As used in this section:

(1) "animal trust" means a trust or an interest in a trust created to provide for the care of one or more animals; and

(2) "protector" means a person appointed in an animal trust to enforce the trust on behalf of the animal

or, if no such person is appointed in the trust, a person appointed by the court for that purpose.

B. The decanting power may be exercised over an animal trust that has a protector to the extent that the trust could be decanted under the Uniform Trust Decanting Act as if each animal that benefits from the trust were an individual if the protector consents in a signed record to the exercise of the power.

C. A protector for an animal has the rights under the Uniform Trust Decanting Act of a qualified beneficiary.

D. Notwithstanding any other provision of the Uniform Trust Decanting Act, if a first trust is an animal trust, in an exercise of the decanting power, the second trust shall provide that trust property may be applied only to its intended purpose for the period the first trust benefited the animal.

SECTION 1-124. TERMS OF SECOND TRUST.--A reference in the Uniform Trust Code to a trust instrument or terms of the trust includes a second-trust instrument and the terms of the second trust.

SECTION 1-125. SETTLOR.--

A. For purposes of New Mexico law other than the Uniform Trust Decanting Act and subject to Subsection B of this section, a settlor of a first trust is deemed to be the settlor of the second trust with respect to the portion of

the principal of the first trust subject to the exercise of the decanting power.

B. In determining settlor intent with respect to a second trust, the intent of a settlor of the first trust, a settlor of the second trust and the authorized fiduciary may be considered.

SECTION 1-126. LATER-DISCOVERED PROPERTY.--

A. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after the exercise of the power is part of the trust estate of the second trust or trusts.

B. Except as otherwise provided in Subsection C of this section, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust or property paid to or acquired by the first trust after exercise of the power remains part of the trust estate of the first trust.

C. An authorized fiduciary may provide in an exercise of the decanting power, or by the terms of a second trust, for disposition of later-discovered property belonging to the first trust or property paid to or acquired by the

first trust after exercise of the power.

SECTION 1-127. OBLIGATIONS.--A debt, liability or other obligation enforceable against property of a first trust is enforceable to the same extent against the property when held by the second trust after exercise of the decanting power.

SECTION 1-128. UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing the Uniform Trust Decanting Act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 1-129. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform Trust Decanting Act modifies, limits or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 2-101. Section 45-2-904 NMSA 1978 (being Laws 1992, Chapter 66, Section 4, as amended) is amended to read:

"45-2-904. EXCLUSIONS.--

A. Section 45-2-901 NMSA 1978 does not apply to:

(1) a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment

arising out of:

(a) a premarital or postmarital agreement;

(b) a separation or divorce settlement;

(c) a spouse's election;

(d) a similar arrangement arising out of a prospective, existing or previous marital relationship between the parties;

(e) a contract to make or not to revoke a will or trust;

(f) a contract to exercise or not to exercise a power of appointment;

(g) a transfer in satisfaction of a duty of support; or

(h) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease or mortgage property and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) a nonvested property interest held by a

charity, government or governmental agency or subdivision if the nonvested property interest is preceded by an interest held by another charity, government or governmental agency or subdivision;

(6) a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral or other current or deferred benefit plan for one or more employees, independent contractors or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse;

(7) a property interest, power of appointment or arrangement that was not subject to the common-law rule against perpetuities or that is excluded by another statute of New Mexico; or

(8) a property interest held in trust.

B. For real property held in trust, at the end of three hundred sixty-five years from the later of the date on which an interest in real property is added to or purchased

by a trust or the date that the trust became irrevocable, if the interest in real property is still held in trust and if the trust instrument:

(1) provides for the distribution of the interest upon termination of the trust, the property shall be distributed as though termination occurred at that time;

(2) does not provide for the distribution of the interest upon termination of the trust, the property shall be distributed to the beneficiaries who are then entitled to receive income from the trust:

(a) in proportion to the amount of income each is entitled to receive; or

(b) if that proportion is not specified in the trust instrument, in equal shares; or

(3) does not provide for the distribution of the interest upon termination of the trust and there is no income beneficiary of the trust, the property shall be distributed, pursuant to the laws of New Mexico then in effect that govern the distribution of intestate real property, to the then-living persons who are then determined to be the settlor's or testator's distributees as though the settlor or testator had died at that time, intestate, a resident of New Mexico and owning the property so distributable. For the purposes of this paragraph, "settlor" means a person who creates or contributes property to a

trust.

C. A trust shall not become void or subject to termination under this section or Section 45-2-901 NMSA 1978 if:

(1) a trust holds an interest in a corporation, a limited liability company, a partnership, a statutory trust, a business trust or another business entity;

(2) the entity is the owner of an interest in real property;

(3) the entity terminates; and

(4) the trust becomes the holder of an interest in real property.

D. Except as otherwise provided in the trust instrument, the trustee of a trust that becomes the holder of an interest in real property through the sequence outlined in Subsection C of this section may:

(1) distribute the interest in real property in accordance with this subsection; or

(2) convey the interest in real property to another business entity in exchange for an interest in that entity to be held by the trustee.

E. For the purposes of this section, "real property" does not include:

(1) intangible personal property; or

(2) an interest in a corporation, a limited

liability company, a partnership, a statutory trust, a business trust or another business entity, regardless of whether the entity is the owner of an interest in real property."

SECTION 3-101. EFFECTIVE DATE.--

A. The effective date of the provisions of Section 2-101 of this act is July 1, 2016.

B. The effective date of the provisions of Sections 1-101 through 1-129 of this act is January 1, 2017.

AN ACT

RELATING TO PROPERTY; ENACTING THE UNIFORM POWERS OF APPOINTMENT ACT; MAKING TECHNICAL AND CONFORMING CHANGES TO THE UNIFORM PROBATE CODE AND THE UNIFORM TRUST CODE; AMENDING PROVISIONS OF THE UNIFORM PROBATE CODE PERTAINING TO NOTICE, TIME FOR PRESENTATION OF CLAIMS, PENALTY CLAUSES AND CLOSING AN ESTATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Article 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE.--Sections 101 through 603 of this act may be cited as the "Uniform Powers of Appointment Act".

SECTION 102. DEFINITIONS.--As used in the Uniform Powers of Appointment Act:

A. "appointee" means a person to which a powerholder makes an appointment of appointive property;

B. "appointive property" means the property or property interest subject to a power of appointment;

C. "blanket-exercise clause" means a clause in an instrument that exercises a power of appointment and is not a specific-exercise clause. "Blanket-exercise clause" includes a clause that:

(1) expressly uses the words "any power" in

exercising any power of appointment the powerholder has;

(2) expressly uses the words "any property" in appointing any property over which the powerholder has a power of appointment; or

(3) disposes of all property subject to disposition by the powerholder;

D. "donor" means a person that creates a power of appointment;

E. "exclusionary power of appointment" means a power of appointment exercisable in favor of any one or more of the permissible appointees to the exclusion of the other permissible appointees;

F. "general power of appointment" means a power of appointment exercisable in favor of the powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate;

G. "gift-in-default clause" means a clause identifying a taker in default of appointment;

H. "impermissible appointee" means a person that is not a permissible appointee;

I. "instrument" means a record;

J. "nongeneral power of appointment" means a power of appointment that is not a general power of appointment;

K. "permissible appointee" means a person in whose favor a powerholder may exercise a power of appointment;

L. "person" means an individual; an estate; a trust; a business or nonprofit entity; a public corporation; a government or governmental subdivision, agency or instrumentality; or another legal entity;

M. "power of appointment" means a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another power of appointment over the appointive property. "Power of appointment" does not include a power of attorney;

N. "powerholder" means a person in which a donor creates a power of appointment;

O. "presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. "Presently exercisable power of appointment":

(1) includes a power of appointment not exercisable until the occurrence of a specified event, the satisfaction of an ascertainable standard or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

(2) does not include a power exercisable only at the powerholder's death;

P. "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

Q. "specific-exercise clause" means a clause in an instrument that specifically refers to and exercises a particular power of appointment;

R. "taker in default of appointment" means a person that takes all or part of the appointive property to the extent the powerholder does not effectively exercise the power of appointment; and

S. "terms of the instrument" means the manifestation of the intent of the maker of the instrument regarding the instrument's provisions as expressed in the instrument or as may be established by other evidence that would be admissible in a legal proceeding.

SECTION 103. GOVERNING LAW.--Unless the terms of the instrument creating a power of appointment manifest a contrary intent:

A. the creation, revocation or amendment of the power is governed by the law of the donor's domicile at the relevant time; and

B. the exercise, release or disclaimer of the power, or the revocation or amendment of the exercise,

release or disclaimer of the power, is governed by the law of the powerholder's domicile at the relevant time.

SECTION 104. COMMON LAW AND PRINCIPLES OF EQUITY.--The common law and principles of equity supplement the Uniform Powers of Appointment Act, except to the extent modified by that act or New Mexico law other than that act.

Article 2

CREATION, REVOCATION AND AMENDMENT OF POWER OF APPOINTMENT

SECTION 201. CREATION OF POWER OF APPOINTMENT.--

A. A power of appointment is created only if:

(1) the instrument creating the power:

(a) is valid under applicable law; and

(b) except as otherwise provided in Subsection B of this section, transfers the appointive property; and

(2) the terms of the instrument creating the power manifest the donor's intent to create in a powerholder a power of appointment over the appointive property exercisable in favor of a permissible appointee.

B. Subparagraph (b) of Paragraph (1) of Subsection A of this section does not apply to the creation of a power of appointment by the exercise of a power of appointment.

C. A power of appointment shall not be created in a deceased individual.

D. Subject to the provisions of Section 45-2-901

NMSA 1978, a power of appointment may be created in an unborn or unascertained powerholder.

SECTION 202. NONTRANSFERABILITY.--A powerholder shall not transfer a power of appointment. If a powerholder dies without exercising or releasing a power, the power lapses.

SECTION 203. PRESUMPTION OF UNLIMITED AUTHORITY.--Subject to Section 205 of the Uniform Powers of Appointment Act, and unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is:

A. presently exercisable;

B. exclusionary; and

C. except as otherwise provided in Section 204 of the Uniform Powers of Appointment Act, general.

SECTION 204. EXCEPTION TO PRESUMPTION OF UNLIMITED AUTHORITY.--Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the power is nongeneral if:

A. the power is exercisable only at the powerholder's death; and

B. the permissible appointees of the power are a defined and limited class that does not include the powerholder's estate, the powerholder's creditors or the creditors of the powerholder's estate.

SECTION 205. RULES OF CLASSIFICATION.--

A. As used in this section, "adverse party" means a person with a substantial beneficial interest in property that would be affected adversely by a powerholder's exercise or nonexercise of a power of appointment in favor of the powerholder, the powerholder's estate, a creditor of the powerholder or a creditor of the powerholder's estate.

B. If a powerholder may exercise a power of appointment only with the consent or joinder of an adverse party, the power is nongeneral.

C. If the permissible appointees of a power of appointment are not defined and limited, the power is exclusionary.

SECTION 206. POWER TO REVOKE OR AMEND.--A donor may revoke or amend a power of appointment only to the extent that:

A. the instrument creating the power is revocable by the donor; or

B. the donor reserves a power of revocation or amendment in the instrument creating the power of appointment.

Article 3

EXERCISE OF POWER OF APPOINTMENT

SECTION 301. REQUISITES FOR EXERCISE OF POWER OF APPOINTMENT.--A power of appointment is exercised only:

A. if the instrument exercising the power is valid

under applicable law; and

B. if the terms of the instrument exercising the power:

(1) manifest the powerholder's intent to exercise the power; and

(2) subject to Section 304 of the Uniform Powers of Appointment Act, satisfy the requirements of exercise, if any, imposed by the donor; and

C. to the extent the appointment is a permissible exercise of the power.

SECTION 302. INTENT TO EXERCISE--DETERMINING INTENT FROM RESIDUARY CLAUSE.--

A. As used in this section:

(1) "residuary clause" does not include a residuary clause containing a blanket-exercise clause or a specific-exercise clause; and

(2) "will" includes a codicil and a testamentary instrument that revises another will.

B. A residuary clause in a powerholder's will, or a comparable clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a power of appointment only if:

(1) the terms of the instrument containing the residuary clause do not manifest a contrary intent;

(2) the power is a general power exercisable

in favor of the powerholder's estate;

(3) there is no gift-in-default clause or the gift-in-default clause is ineffective; and

(4) the powerholder did not release the power.

SECTION 303. INTENT TO EXERCISE--AFTER-ACQUIRED POWER.--Unless the terms of the instrument exercising a power of appointment manifest a contrary intent:

A. except as otherwise provided in Subsection B of this section, a blanket-exercise clause extends to a power acquired by the powerholder after executing the instrument containing the clause; and

B. if the powerholder is also the donor of the power, the clause does not extend to the power unless there is no gift-in-default clause or the gift-in-default clause is ineffective.

SECTION 304. SUBSTANTIAL COMPLIANCE WITH DONOR-IMPOSED FORMAL REQUIREMENT.--A powerholder's substantial compliance with a formal requirement of appointment imposed by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

A. the powerholder knows of and intends to exercise the power; and

B. the powerholder's manner of attempted exercise

of the power does not impair a material purpose of the donor in imposing the requirement.

SECTION 305. PERMISSIBLE APPOINTMENT.--

A. A powerholder of a general power of appointment that permits appointment to the powerholder or the powerholder's estate may make any appointment, including an appointment in trust or creating a new power of appointment, that the powerholder could make in disposing of the powerholder's own property.

B. A powerholder of a general power of appointment that permits appointment only to the creditors of the powerholder or of the powerholder's estate may appoint only to those creditors.

C. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the powerholder of a nongeneral power may:

(1) make an appointment in any form, including an appointment in trust, in favor of a permissible appointee;

(2) create a general power in a permissible appointee; or

(3) create a nongeneral power in any person to appoint to one or more of the permissible appointees of the original nongeneral power.

SECTION 306. APPOINTMENT TO DECEASED APPOINTEE OR

PERMISSIBLE APPOINTEE'S DESCENDANT.--

A. Subject to Sections 45-2-603 and 45-2-707 NMSA 1978, an appointment to a deceased appointee is ineffective.

B. Unless the terms of the instrument creating a power of appointment manifest a contrary intent, a powerholder of a nongeneral power may exercise the power in favor of, or create a new power of appointment in, a descendant of a deceased permissible appointee whether or not the descendant is described by the donor as a permissible appointee.

SECTION 307. IMPERMISSIBLE APPOINTMENT.--

A. Except as otherwise provided in Section 306 of the Uniform Powers of Appointment Act, an exercise of a power of appointment in favor of an impermissible appointee is ineffective.

B. An exercise of a power of appointment in favor of a permissible appointee is ineffective to the extent the appointment is a fraud on the power.

SECTION 308. SELECTIVE ALLOCATION DOCTRINE.--If a powerholder exercises a power of appointment in a disposition that also disposes of property the powerholder owns, the owned property and the appointive property must be allocated in the permissible manner that best carries out the powerholder's intent.

SECTION 309. CAPTURE DOCTRINE--DISPOSITION OF

INEFFECTIVELY APPOINTED PROPERTY UNDER GENERAL POWER.--To the extent a powerholder of a general power of appointment, other than a power to withdraw property from, revoke or amend a trust, makes an ineffective appointment:

A. the gift-in-default clause controls the disposition of the ineffectively appointed property; or

B. if there is no gift-in-default clause or to the extent the clause is ineffective, the ineffectively appointed property:

(1) passes to:

(a) the powerholder if the powerholder is a permissible appointee and is living; or

(b) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(2) if there is no taker under Paragraph (1) of this subsection, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

SECTION 310. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED GENERAL POWER.--To the extent a powerholder releases or fails to exercise a general power of appointment other than a power to withdraw property from, revoke or amend a trust:

A. the gift-in-default clause controls the disposition of the unappointed property; or

B. if there is no gift-in-default clause or to the extent the clause is ineffective:

(1) except as otherwise provided in Paragraph (2) of this subsection, the unappointed property passes to:

(a) the powerholder if the powerholder is a permissible appointee and is living; or

(b) if the powerholder is an impermissible appointee or deceased, the powerholder's estate if the estate is a permissible appointee; or

(2) to the extent the powerholder released the power, or if there is no taker under Paragraph (1) of this subsection, the unappointed property passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

SECTION 311. DISPOSITION OF UNAPPOINTED PROPERTY UNDER RELEASED OR UNEXERCISED NONGENERAL POWER.--To the extent a powerholder releases, ineffectively exercises or fails to exercise a nongeneral power of appointment:

A. the gift-in-default clause controls the disposition of the unappointed property; or

B. if there is no gift-in-default clause or to the extent that the clause is ineffective, the unappointed property:

(1) passes to the permissible appointees if:

(a) the permissible appointees are defined and limited; and

(b) the terms of the instrument creating the power do not manifest a contrary intent; or

(2) if there is no taker under Paragraph (1) of this subsection, passes under a reversionary interest to the donor or the donor's transferee or successor in interest.

SECTION 312. DISPOSITION OF UNAPPOINTED PROPERTY IF PARTIAL APPOINTMENT TO TAKER IN DEFAULT.--Unless the terms of the instrument creating or exercising a power of appointment manifest a contrary intent, if the powerholder makes a valid partial appointment to a taker in default of appointment, the taker in default of appointment may share fully in unappointed property.

SECTION 313. APPOINTMENT TO TAKER IN DEFAULT.--If a powerholder makes an appointment to a taker in default of appointment and the appointee would have taken the property under a gift-in-default clause had the property not been appointed, the power of appointment is deemed not to have been exercised and the appointee takes under the clause.

SECTION 314. POWERHOLDER'S AUTHORITY TO REVOKE OR AMEND EXERCISE.--A powerholder may revoke or amend an exercise of a power of appointment only to the extent that:

A. the powerholder reserves a power of revocation or amendment in the instrument exercising the power of

appointment and, if the power is nongeneral, the terms of the instrument creating the power of appointment do not prohibit the reservation; or

B. the terms of the instrument creating the power of appointment provide that the exercise is revocable or amendable.

Article 4

DISCLAIMER OR RELEASE; CONTRACT TO APPOINT OR NOT TO APPOINT

SECTION 401. DISCLAIMER.--As provided by the Uniform Disclaimer of Property Interests Act:

A. a powerholder may disclaim all or part of a power of appointment; and

B. a permissible appointee, appointee or taker in default of appointment may disclaim all or part of an interest in appointive property.

SECTION 402. AUTHORITY TO RELEASE.--A powerholder may release a power of appointment, in whole or in part, except to the extent that the terms of the instrument creating the power prevent the release.

SECTION 403. METHOD OF RELEASE.--A powerholder of a releasable power of appointment may release the power in whole or in part:

A. by substantial compliance with a method provided in the terms of the instrument creating the power; or

B. if the terms of the instrument creating the power do not provide a method or the method provided in the terms of the instrument is not expressly made exclusive, by a record manifesting the powerholder's intent by clear and convincing evidence.

SECTION 404. REVOCATION OR AMENDMENT OF RELEASE.--A powerholder may revoke or amend a release of a power of appointment only to the extent that:

A. the instrument of release is revocable by the powerholder; or

B. the powerholder reserves a power of revocation or amendment in the instrument of release.

SECTION 405. POWER TO CONTRACT--PRESENTLY EXERCISABLE POWER OF APPOINTMENT.--A powerholder of a presently exercisable power of appointment may contract:

A. not to exercise the power; or

B. to exercise the power if the contract when made does not confer a benefit on an impermissible appointee.

SECTION 406. POWER TO CONTRACT--POWER OF APPOINTMENT NOT PRESENTLY EXERCISABLE.--A powerholder of a power of appointment that is not presently exercisable may contract to exercise or not to exercise the power only if the powerholder:

A. is also the donor of the power; and

B. has reserved the power in a revocable trust.

SECTION 407. REMEDY FOR BREACH OF CONTRACT TO APPOINT OR NOT TO APPOINT.--The remedy for a powerholder's breach of a contract to appoint or not to appoint appointive property is limited to damages payable out of the appointive property or, if appropriate, specific performance of the contract.

Article 5

RIGHTS OF POWERHOLDER'S CREDITORS IN APPOINTIVE PROPERTY

SECTION 501. CREDITOR CLAIM--GENERAL POWER CREATED BY POWERHOLDER.--

A. As used in this section, "power of appointment created by the powerholder" includes a power of appointment created in a transfer by another person to the extent that the powerholder contributed value to the transfer.

B. Appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of the powerholder or of the powerholder's estate to the extent provided in the Uniform Voidable Transactions Act.

C. Subject to Subsection B of this section, appointive property subject to a general power of appointment created by the powerholder is not subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent the powerholder irrevocably appointed the property in favor of a person other than the powerholder or the powerholder's estate.

D. Subject to Subsections B and C of this section, and notwithstanding the presence of a spendthrift provision or whether the claim arose before or after the creation of the power of appointment, appointive property subject to a general power of appointment created by the powerholder is subject to a claim of a creditor of:

(1) the powerholder, to the same extent as if the powerholder owned the appointive property, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent the estate is insufficient to satisfy the claim and subject to the right of a decedent to direct the source from which liabilities are paid, if the power is exercisable at the powerholder's death.

SECTION 502. CREDITOR CLAIM--GENERAL POWER NOT CREATED BY POWERHOLDER.--

A. Except as otherwise provided in Subsection B of this section, appointive property subject to a general power of appointment created by a person other than the powerholder is subject to a claim of a creditor of:

(1) the powerholder, to the extent that the powerholder's property is insufficient, if the power is presently exercisable; and

(2) the powerholder's estate, to the extent that the estate is insufficient, subject to the right of a

decedent to direct the source from which liabilities are paid.

B. Subject to Subsection C of Section 504 of the Uniform Powers of Appointment Act, a power of appointment created by a person other than the powerholder that is subject to an ascertainable standard relating to an individual's health, education, support or maintenance within the meaning of 26 U.S.C. Section 2041(b)(1)(A), as amended, or 26 U.S.C. Section 2514(c)(1), as amended, is treated for purposes of this article as a nongeneral power.

SECTION 503. POWER TO WITHDRAW.--

A. For purposes of this article and except as otherwise provided in Subsection B of this section, a power to withdraw property from a trust is treated, during the time the power may be exercised, as a presently exercisable general power of appointment to the extent of the property subject to the power to withdraw.

B. On the lapse, release or waiver of a power to withdraw property from a trust, the power is treated as a presently exercisable general power of appointment only to the extent that the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in 26 U.S.C. Section 2041(b)(2), as amended, and 26 U.S.C. Section 2514(e), as amended, or the amount specified in 26 U.S.C. Section 2503(b), as amended.

SECTION 504. CREDITOR CLAIM--NONGENERAL POWER.--

A. Except as otherwise provided in Subsections B and C of this section, appointive property subject to a nongeneral power of appointment is exempt from a claim of a creditor of the powerholder or the powerholder's estate.

B. Appointive property subject to a nongeneral power of appointment is subject to a claim of a creditor of the powerholder or the powerholder's estate to the extent that the powerholder owned the property and, reserving the nongeneral power, transferred the property in violation of the Uniform Voidable Transactions Act.

C. If the initial gift in default of appointment is to the powerholder or the powerholder's estate, a nongeneral power of appointment is treated for purposes of this article as a general power.

Article 6

MISCELLANEOUS PROVISIONS

SECTION 601. UNIFORMITY OF APPLICATION AND CONSTRUCTION.--In applying and construing the Uniform Powers of Appointment Act, consideration shall be given to the need to promote uniformity of the act with respect to its subject matter among states that enact it.

SECTION 602. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.--The Uniform Powers of Appointment Act modifies, limits or supersedes the Electronic

Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 603. APPLICATION TO EXISTING RELATIONSHIPS.--

A. Except as otherwise provided in the Uniform Powers of Appointment Act, on and after January 1, 2017:

(1) the Uniform Powers of Appointment Act applies to a power of appointment created before, on or after January 1, 2017;

(2) the Uniform Powers of Appointment Act applies to a judicial proceeding concerning a power of appointment commenced on or after January 1, 2017;

(3) the Uniform Powers of Appointment Act applies to a judicial proceeding concerning a power of appointment commenced before January 1, 2017 unless the court finds that application of a particular provision of the Uniform Powers of Appointment Act would interfere substantially with the effective conduct of the judicial proceeding or prejudice a right of a party, in which case the particular provision of the Uniform Powers of Appointment Act does not apply and the superseded law applies;

(4) a rule of construction or presumption provided in the Uniform Powers of Appointment Act applies to

an instrument executed before January 1, 2017 unless there is a clear indication of a contrary intent in the terms of the instrument; and

(5) except as otherwise provided in Paragraphs (1) through (4) of this subsection, an action done before January 1, 2017 is not affected by the Uniform Powers of Appointment Act.

B. If a right is acquired, extinguished or barred on the expiration of a prescribed period that commenced under New Mexico law other than the Uniform Powers of Appointment Act before January 1, 2017, the law continues to apply to the right.

SECTION 701. Section 45-1-108 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-108) is amended to read:

"45-1-108. ACTS BY HOLDER OF GENERAL POWER.-- For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, or to perform other duties, and for purposes of consenting to modification or termination of a trust or deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests, as objects, takers in default or otherwise,

are subject to the power."

SECTION 702. Section 45-1-401 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-401) is amended to read:

"45-1-401. NOTICE--METHOD AND TIME OF GIVING.--

A. If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or, if the interested person is represented by an attorney, to the attorney. Notice shall be given:

(1) by mailing a copy thereof at least fourteen days before the time set for the hearing by certified, registered or ordinary first class mail addressed to the person being notified at the post office address given in the demand for notice, if any, or at the person's office or place of residence, if known;

(2) by service of a copy thereof upon the person being notified in the manner provided by the rules of civil procedure for service of summons and complaint in civil actions; or

(3) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing a copy thereof once a week for three consecutive weeks in a newspaper of general circulation in the county in which the hearing is to be held, the last

publication of which is to be at least ten days before the time set for the hearing.

B. The court for good cause shown may provide for a different method or time of giving notice for a hearing.

C. Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding."

SECTION 703. Section 45-1-403 NMSA 1978 (being Laws 1975, Chapter 257, Section 1-403, as amended) is amended to read:

"45-1-403. PLEADINGS.--In formal proceedings involving trusts, or estates of decedents, minors, protected persons or incapacitated persons, and in judicially supervised settlements, interests to be affected shall be described in pleadings that give reasonable information to owners by name or class, by reference to the instrument creating the interests or in another appropriate manner."

SECTION 704. A new section of the Uniform Probate Code, Section 45-1-403.1 NMSA 1978, is enacted to read:

"45-1-403.1. REPRESENTATION--BASIC EFFECT.--

A. Notice to a person who may represent and bind another person pursuant to the provisions of Chapter 45 NMSA 1978 has the same effect as if notice were given directly to the other person.

B. The consent of a person who may represent and bind another person pursuant to the provisions of Chapter 45

NMSA 1978 is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

C. Except as otherwise provided in Sections 46A-4-411 and 46A-6-602 NMSA 1978, a person who, pursuant to the provisions of Chapter 45 NMSA 1978, may represent a settlor who lacks capacity, may receive notice and give a binding consent on the settlor's behalf.

D. A settlor shall not represent or bind a beneficiary pursuant to the provisions of Chapter 45 NMSA 1978 with respect to the termination or modification of a trust under Subsection A of Section 46A-4-411 NMSA 1978."

SECTION 705. A new section of the Uniform Probate Code, Section 45-1-403.2 NMSA 1978, is enacted to read:

"45-1-403.2. REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT.--To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default or otherwise, are subject to the power."

SECTION 706. A new section of the Uniform Probate Code, Section 45-1-403.3 NMSA 1978, is enacted to read:

"45-1-403.3. REPRESENTATION BY FIDUCIARIES AND

PARENTS.--To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

A. a conservator may represent and bind the estate that the conservator controls;

B. a guardian may represent and bind the protected person if a conservator of the protected person's estate has not been appointed;

C. an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

D. a trustee may represent and bind the beneficiaries of the trust;

E. a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

F. a parent may represent and bind the parent's minor or unborn child if a conservator or guardian for the child has not been appointed."

SECTION 707. A new section of the Uniform Probate Code, Section 45-1-403.4 NMSA 1978, is enacted to read:

"45-1-403.4. REPRESENTATION BY PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST.--Unless otherwise represented, a minor, incapacitated or unborn person, or a

person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented."

SECTION 708. A new section of the Uniform Probate Code, Section 45-1-403.5 NMSA 1978, is enacted to read:

"45-1-403.5. APPOINTMENT OF REPRESENTATIVE.--

A. If the court determines that an interest is not represented under Chapter 45 NMSA 1978, or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent and otherwise represent, bind and act on behalf of a minor, incapacitated or unborn person, or a person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

B. A representative may act on behalf of the person represented with respect to any matter arising under the Uniform Probate Code, whether or not a judicial proceeding concerning the estate is pending.

C. In making decisions, a representative may consider the general benefit accruing to the living members of the person's family."

SECTION 709. Section 45-2-506 NMSA 1978 (being Laws

1993, Chapter 174, Section 29) is amended to read:

"45-2-506. CHOICE OF LAW AS TO EXECUTION.--A written will is valid if executed in compliance with Section 45-2-502 NMSA 1978 or if its execution complies with the law at the time of execution of the place where the will is executed or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national."

SECTION 710. Section 45-2-517 NMSA 1978 (being Laws 1995, Chapter 210, Section 13) is amended to read:

"45-2-517. PENALTY CLAUSE FOR CONTEST.--A provision in a governing instrument purporting to penalize an interested person for contesting the governing instrument or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."

SECTION 711. Section 45-2-608 NMSA 1978 (being Laws 1993, Chapter 174, Section 47) is amended to read:

"45-2-608. EXERCISE OF POWER OF APPOINTMENT.--In the absence of a requirement that a power of appointment be exercised by a reference or by an express or specific reference to the power, a general residuary clause in a will or a will making general disposition of all of the testator's property expresses an intention to exercise a power of appointment held by the testator only if:

A. the power is a general power exercisable in

favor of the powerholder's estate and the creating instrument does not contain an effective gift if the power is not exercised; or

B. the testator's will manifests an intention to include the property subject to the power."

SECTION 712. Section 45-2-704 NMSA 1978 (being Laws 1993, Chapter 174, Section 52) is amended to read:

"45-2-704. POWER OF APPOINTMENT--COMPLIANCE WITH SPECIFIC REFERENCE REQUIREMENT.--A powerholder's substantial compliance with a formal requirement of appointment imposed in a governing instrument by the donor, including a requirement that the instrument exercising the power of appointment make reference or specific reference to the power, is sufficient if:

A. the powerholder knows of and intends to exercise the power; and

B. the powerholder's manner of attempted exercise does not impair a material purpose of the donor in imposing the requirement."

SECTION 713. Section 45-2-904 NMSA 1978 (being Laws 1992, Chapter 66, Section 4, as amended) is amended to read:

"45-2-904. EXCLUSIONS.--Section 45-2-901 NMSA 1978 does not apply to:

A. a nonvested property interest or a power of appointment arising out of a nondonative transfer, except a

nonvested property interest or a power of appointment arising out of:

(1) a premarital or postmarital agreement;

(2) a separation or divorce settlement;

(3) a spouse's election;

(4) a similar arrangement arising out of a prospective, existing or previous marital relationship between the parties;

(5) a contract to make or not to revoke a will or trust;

(6) a contract to exercise or not to exercise a power of appointment;

(7) a transfer in satisfaction of a duty of support; or

(8) a reciprocal transfer;

B. a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease or mortgage property and the power of a fiduciary to determine principal and income;

C. a power to appoint a fiduciary;

D. a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

E. a nonvested property interest held by a

charity, government or governmental agency or subdivision if the nonvested property interest is preceded by an interest held by another charity, government or governmental agency or subdivision;

F. a nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral or other current or deferred benefit plan for one or more employees, independent contractors or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

G. a property interest, power of appointment or arrangement that was not subject to the common-law rule against perpetuities or that is excluded by another statute of New Mexico."

SECTION 714. Section 45-3-712 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-712) is amended to read:

"45-3-712. IMPROPER EXERCISE OF POWER--BREACH OF FIDUCIARY DUTY.--If the exercise of power concerning the

estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of the personal representative's fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in Sections 45-3-713 and 45-3-714 NMSA 1978."

SECTION 715. Section 45-3-801 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-801, as amended) is repealed and a new Section 45-3-801 NMSA 1978 is enacted to read:

"45-3-801. NOTICE TO CREDITORS.--

A. A personal representative upon appointment may publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the county in which the probate proceeding is pending, announcing the personal representative's appointment and address and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred.

B. A personal representative may give written notice by mail or other delivery to a creditor, announcing the personal representative's appointment and address and notifying the creditor to present the creditor's claim within four months after the published notice, if given as provided in Subsection A of this section, or within sixty days after

the mailing or other delivery of the notice, whichever is later, or be forever barred.

C. The personal representative is not liable to anyone for giving or failing to give notice pursuant to this section."

SECTION 716. Section 45-3-803 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-803, as amended) is amended to read:

"45-3-803. LIMITATIONS ON PRESENTATION OF CLAIMS.--

A. All claims against a decedent's estate that arose before the death of the decedent, including claims of the state and any political subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, if not barred earlier by another statute of limitations or nonclaim statute, are barred against the estate, the personal representative and the heirs, devisees and nonprobate transferees of the decedent unless presented within the earlier of the following:

(1) one year after the decedent's death; or

(2) the time provided by Subsection B of Section 45-3-801 NMSA 1978 for creditors who are given actual notice and the time provided in Subsection A of Section 45-3-801 NMSA 1978 for all creditors barred by publication.

B. A claim described in Subsection A of this

section that is barred by the nonclaim statute of the decedent's domicile before the giving of notice to creditors in this state is barred in this state.

C. All claims against a decedent's estate that arise at or after the death of the decedent, including claims of the state and any political subdivision of the state, whether due or to become due, absolute or contingent, liquidated or unliquidated or founded on contract, tort or other legal basis, are barred against the estate, the personal representative and the heirs and devisees of the decedent unless presented as follows:

(1) a claim based on a contract with the personal representative within four months after performance by the personal representative is due; or

(2) any other claim within the later of four months after it arises or the time specified in Paragraph (1) of this subsection.

D. Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge or other lien upon property of the estate;

(2) to the limits of the insurance protection only, a proceeding to establish liability of the decedent or the personal representative for which the decedent or personal representative is protected by liability insurance; or

(3) collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or by the attorney or accountant for the personal representative of the estate."

SECTION 717. Section 45-3-902 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-902, as amended) is amended to read:

"45-3-902. DISTRIBUTION--ORDER IN WHICH ASSETS APPROPRIATED--ABATEMENT.--

A. Except as provided in Subsection C of this section, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(1) property not disposed of by the will;

(2) residuary devises;

(3) general devises; and

(4) specific devises.

B. For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged and, upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if

full distribution of the property had been made in accordance with the terms of the will.

C. If the will expresses an order of abatement or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in Subsection A of this section, the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

D. If an estate of a decedent consists partly of separate property and partly of community property, the debts and expenses of administration shall be apportioned and charged against the different kinds of property in accordance with the provisions of Subsection B of Section 45-2-807 NMSA 1978.

E. If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in or contribution from other interests in the remaining assets."

SECTION 718. Section 45-3-905 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-905) is repealed and a new Section 45-3-905 NMSA 1978 is enacted to read:

"45-3-905. PENALTY CLAUSE FOR CONTEST.--A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for

instituting proceedings."

SECTION 719. Section 45-3-912 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-912) is amended to read:

"45-3-912. PRIVATE AGREEMENTS AMONG SUCCESSORS TO DECEDENT BINDING ON PERSONAL REPRESENTATIVE.--Subject to the rights of creditors and taxing authorities, successors or their representatives may agree among themselves to alter the interests, shares or amounts to which they are entitled under the will of the decedent or under the laws of intestacy in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to the personal representative's obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration and to carry out the responsibilities of the personal representative's office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing in this section relieves trustees of any duties owed to beneficiaries of trusts."

SECTION 720. Section 45-3-1003 NMSA 1978 (being Laws

1975, Chapter 257, Section 3-1003, as amended) is amended to read:

"45-3-1003. CLOSING ESTATES--BY SWORN STATEMENT OF PERSONAL REPRESENTATIVE.--

A. Unless prohibited by order of the district court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court, no earlier than six months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representative or a previous personal representative has:

(1) determined that the time limited for presentation of creditors' claims has expired;

(2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or it shall state in detail other arrangements that have been made to accommodate outstanding liabilities; and

(3) sent a copy of the statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the personal representative's administration to the distributees whose interests are affected thereby, including guardians ad litem appointed pursuant to Section 45-1-403 NMSA 1978, conservators and guardians.

B. If no proceedings involving the personal representative are pending in the district court one year after the closing statement is filed, the appointment of the personal representative terminates."

SECTION 721. Section 45-3-1101 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-1101, as amended) is amended to read:

"45-3-1101. EFFECT OF APPROVAL OF AGREEMENTS INVOLVING TRUSTS, INALIENABLE INTERESTS OR INTERESTS OF THIRD PERSONS.--

A. A compromise of any controversy is binding on all the parties thereto as to any lawful matter involving the estate. Matters that may be resolved by the compromise include:

(1) admission to probate of any instrument offered for formal probate as the will of a decedent;

(2) the construction, validity or effect of any governing instrument;

(3) the rights or interests in the estate of the decedent;

(4) the rights or interests of any successor; and

(5) the administration of the estate, if approved in a formal proceeding in the district court for that purpose.

B. A court-approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities that are not parties to it."

SECTION 722. Section 45-3-1102 NMSA 1978 (being Laws 1975, Chapter 257, Section 3-1102, as amended) is amended to read:

"45-3-1102. PROCEDURE FOR SECURING COURT APPROVAL OF COMPROMISE.--The procedure for securing court approval of a compromise is as follows:

A. the terms of the compromise shall be set forth in an agreement in writing that shall be executed by all persons or their representatives having beneficial interests or having claims that will or may be affected by the compromise;

B. any interested person, or the person's

representative, including the personal representative, if any, or a trustee, may then submit the agreement to the district court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust and other fiduciaries and representatives; and

C. after notice to all interested persons or their representatives, including the personal representative of any estate and all affected trustees of trusts, the district court, if it finds that an actual contest or controversy exists and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other persons or their representatives in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate shall then be made in accordance with the terms of the agreement."

SECTION 723. Section 46A-1-113 NMSA 1978 (being Laws 2011, Chapter 124, Section 95) is amended to read:

"46A-1-113. INSURABLE INTEREST OF TRUSTEE.--

A. In this section, "settlor" means a person that

executes a trust instrument. "Settlor" includes a person for which a fiduciary or agent is acting.

B. A trustee of a trust has an insurable interest in the life of an individual insured under a life insurance policy that is owned by the trustee of the trust acting in a fiduciary capacity or that designates the trust itself as the owner if, on the date the policy is issued:

(1) the insured is:

(a) a settlor of the trust; or

(b) an individual in whom a settlor of the trust has, or would have had if living at the time the policy was issued, an insurable interest; and

(2) the life insurance proceeds are primarily for the benefit of one or more trust beneficiaries that have:

(a) an insurable interest in the life of the insured; or

(b) a substantial interest engendered by love and affection in the continuation of the life of the insured and, if not already included under Subparagraph (a) of this paragraph, who are: 1) related within the third degree or closer, as measured by the civil law system of determining degrees of relation, either by blood or law, to the insured; or 2) stepchildren of the insured."

SECTION 724. REPEAL.--Sections 45-2-608 and 45-2-704

NMSA 1978 (being Laws 1993, Chapter 174, Sections 47 and 52) are repealed.

SECTION 725. REPEAL.--Section 45-2-907 NMSA 1978 (being Laws 1995, Chapter 210, Section 30) is repealed.

SECTION 726. TEMPORARY PROVISION--INSTRUCTION TO COMPILER.--The compiler shall compile Sections 101 through 603 of this act in Chapter 46 NMSA 1978.

SECTION 727. EFFECTIVE DATE.--

A. The effective date of the provisions of Sections 701 through 723 and 725 of this act is July 1, 2016.

B. The effective date of the provisions of Sections 101 through 603 and 724 of this act is January 1, 2017.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DAWN SIMONSEN, by her attorney-in-fact BRUCE SIMONSEN,
Plaintiff,

v.

RODERICK L. BREMBY, in his official capacity as Commissioner of the Connecticut Department of Social Services,
Defendant.

No. 15-cv-1399 (VAB)

RULING AND ORDER GRANTING PRELIMINARY INJUNCTION

Plaintiff, Dawn Simonsen, by her attorney-in-fact, Bruce Simonsen, filed a Motion for Issuance of a Temporary Restraining Order and Preliminary Injunction [Doc. No. 19] on October 6, 2015, to enjoin Defendant, Roderick L. Bremby, Commissioner of the Connecticut Department of Social Services, from treating two third-party trusts as available resources in determining Plaintiff's eligibility for Medicaid benefits, when they were decanted to new third-party supplemental needs trusts, and from treating that decanting as disqualifying transfers of assets. For the following reasons, the Court GRANTS Plaintiff's motion for a preliminary injunction, and consequently finds as moot Plaintiff's motion for a temporary restraining order.

I. FINDINGS OF FACT

After holding a hearing on November 5, 2015, the Court makes the following factual findings under Federal Rule of Civil Procedure 52(a)(2), based on the arguments, written submissions, and exhibits presented by the parties.

Plaintiff, Dawn Simonsen, is a 57 year-old quadriplegic who has been a resident requiring ventilator care in the Hospital for Special Care ("HSC") in New Britain, Connecticut,

since October 11, 2013. She has been receiving medical assistance, or Medicaid, benefits from the Connecticut Department of Social Services ("DSS") to pay for that care since March 1, 2014, but her benefits were terminated in June 2015. They were subsequently reinstated pending an adverse fair hearing decision.

Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (the "Medicaid Act"), established a program for medical assistance. "Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

> The federal and state governments share the cost of Medicaid, but each state government administers its own Medicaid plan. State Medicaid plans must, however, comply with applicable federal law and regulations.
>
> Any state that participates in Medicaid must designate 'a single State agency' . . . to administer—or to supervise the administration of—the state's Medicaid plan.

Shakhnes v. Berlin, 689 F.3d 244, 247-48 (2d Cir. 2012) (internal quotation marks and citations omitted). The designated single State agency in Connecticut is DSS. The Medicaid Act requires DSS to grant an opportunity for a fair hearing to any individual whose claim for medical assistance is denied. 42 U.S.C. § 1396a(a)(3).

DSS's determination that Plaintiff is presently ineligible for Medicaid benefits stems from its classification of two former trusts of which Plaintiff was the beneficiary. Plaintiff's mother, Joy A. Miller, established these two third party inter vivos trusts—the Dawn Simonsen GST Trust" and the "Dawn Simonsen Residuary Trust" (the "Predecessor Trusts")—in Florida, and they were funded upon her death in April 2003. The terms of these trusts provided the following:

> The trustee shall pay to my daughter or utilize for her benefit so much of the income and principal of her trust as the trustee deems necessary or advisable from time to time for her health, maintenance in reasonable comfort, education and best interests considering all of her resources known to the trustee and her ability to manage and use such funds for her benefits. In exercising its discretion the trustee shall bear in mind that my daughter has suffered severely from alcohol and drug abuse and that I do not want these trust funds to be used to support a drug or alcohol habit or any other activity which may be detrimental to her in the trustee's sole opinion.
>
> My daughter's health, happiness and best interests are to be considered foremost in priority over those who will receive the remaining trust funds on her death. Subject to the above considerations the trustee is encouraged to be liberal in its use of the funds for her even to the extent of the full expenditure thereof.

Doc. No. 23-2, at 7, 8-9. The Predecessor Trusts also contain a "spendthrift clause," which provides that "[t]he interests of beneficiaries in principal or income shall not be subject to the claims of any creditor, any spouse for alimony or support, or others, or to legal process, and may not be voluntarily or involuntarily alienated or encumbered." Doc. No. 23-2, at 13. Further, the Predecessor Trusts were established such that they are governed by Florida law. Doc. No. 23-2, at 20-21.

As noted above, Plaintiff was admitted to HSC on October 11, 2013, and she has remained there as a patient virtually continuously since that date. On July 31, 2014, a Medicaid benefits application for Plaintiff was filed with DSS. On August 29, 2014, the Trustee of the Predecessor Trusts executed a petition to the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Probate Division (the "Florida Probate Court"), requesting an order declaring that the Trustee's right to invade the principal of the Predecessor Trusts "is an absolute power to invade principal as described in Section 736.04117, Florida Statutes," and granting permission to transfer, or "decant," the assets in the Predecessor Trusts to two new trusts—the "Dawn Simonsen Third Party Special Needs Trust I" and the "Dawn Simonsen Third Party Special Needs Trust II" (the "Successor Trusts"). Along with its petition, the Trustee

submitted a Waiver of Service of Process and Consent, executed by Plaintiff on August 22, 2014, in which Plaintiff consented to the entry of such an order and to the exercise of such power to invade principal. The Florida Probate Court issued the requested order on September 18, 2014. As of September 30, 2014, the Predecessor Trusts had a combined value of over one million dollars, which subsequently transferred to the Successor Trusts between November 1, 2014 and February 28, 2015.

On November 26, 2014, a DSS attorney sent an email to a DSS eligibility services worker in the Long Term Care Unit, opining that the Predecessor Trusts were "general support trusts and, therefore, available to the client for Medicaid eligibility," and that Plaintiff's "consent to transfer of assets in two general support trusts to two supplemental support trusts should be treated as a transfer of assets for less than fair value." Doc. No. 23-4. The DSS attorney concluded that, because Plaintiff was applying for "N01" assistance, for which there is no asset limit, the transfers were not relevant, but that should Plaintiff apply for "L01" assistance, she would incur a penalty period during which she would be ineligible for benefits. *Id.* This email was forwarded to the law firm representing Plaintiff on December 3, 2014. Also on December 3, 2014, DSS determined that Plaintiff was eligible for Medicaid benefits effective March 1, 2014 through August 31, 2015 under the N01 eligibility rules. After August 2015, Plaintiff would have had to apply for L01, *i.e.*, Medicaid Long-Term Care Assistance, in order to maintain her eligibility for long-term services and support.

On December 16, 2014, counsel for Plaintiff responded to DSS counsel's email, disputing DSS's analysis. DSS counsel wrote back on January 6, 2015, adhering to his original eligibility opinion. After further written exchanges between counsel, DSS counsel advised counsel for Plaintiff, in a letter dated June 19, 2015, that the penalty period of Medicaid

ineligibility should actually have begun on September 8, 2014,[1] and that DSS intended to recover all Medicaid benefits that had been paid since that date. On July 8, 2015, DSS issued a Final Decision Notice stating that, due to the trust-to-trust transfer, DSS was setting up a penalty period from September 1, 2014 through September 5, 2021, during which time DSS would not pay for any long-term care services, including under N01.

After Plaintiff did not receive any Medicaid benefits for July 2015, Plaintiff's counsel requested an administrative fair hearing from DSS to review the termination of Plaintiff's Medicaid benefits on August 3, 2015. The request for fair hearing included a request that Plaintiff's benefits continue until a hearing decision was made, and DSS complied by reinstating Plaintiff's N01 eligibility on September 21, 2015, pending the hearing decision. Following the fair hearing held on September 23, 2015, the fair hearing officer issued a decision denying Plaintiff's appeal on December 14, 2015.

In her notice of decision, the fair hearing officer found, *inter alia*, the following key facts: the Predecessor Trusts were general support trusts and thus accessible to Plaintiff for purposes of determining Medicaid eligibility (Doc. No. 35, at 4); as of September 30, 2014, the combined value of the Predecessor Trusts was $1,021,930.99 (*id.*, at 5); the Successor Trusts limited Plaintiff's ability to access the trusts to the extent that the assets are not available to Plaintiff for purposes of determining Medicaid eligibility (*id.*, at 6); some time between September 18, 2014 and February 28, 2015, the funds from the Predecessor Trusts were transferred to the Successor Trusts (*id.*); and DSS decided to penalize Plaintiff $1,022,602.36 for the period commencing September 1, 2014 and ending September 5, 2021 for the transfer of assets for less than fair market value (*id.*, at 7).

[1] DSS appears to have erred in its factual analysis, as the date on which the Florida Probate Court issued its order approving the decanting was September 18, 2014, and not September 8, 2014.

Based on these factual findings, the fair hearing officer determined that made, *inter alia*, the following key conclusions of law: DSS correctly determined Plaintiff's eligibility for Medicaid under the N01 plan for the period of September 1, 2014 through August 31, 2015 (*id.*, at 8); the Social Security Program Operations Manual System is a form of internal guidance for the Social Security Administration and does not constitute policy or have the force of law (*id.*, at 9); DSS did not use more restrictive methodology than the Supplemental Security Income ("SSI") methodology (*id.*); the State of Connecticut's regulatory standard is entirely consistent with the plain language of 20 C.F.R. § 416.1201(a)(1) (*id.*); the DSS Uniform Policy Manual provides that the principal of an irrevocable trust should be considered an available asset if there are any circumstances under which a payment from the trust could be made to or on behalf of the individual (*id.*, at 10); DSS was correct to find that Plaintiff transferred funds from the purpose of qualifying for Long Term Care Medicaid (*id.*, at 11); and DSS incorrectly began the penalty period on September 1, 2014 because the penalty period must begin on the date when the funds were actually transferred, which did not occur until some time between September 18, 2014 and February 28, 2015 (*id.*, at 12).

Four main points underscored the fair hearing officer's decision upholding the penalty imposed by DSS. First, she noted that the language of the Predecessor Trusts encouraged the trustee to be liberal in its use of funds for Plaintiff, even to the extent of the full expenditure thereof. *Id.*, at 13. Second, she determined that the Social Security Program Operations Manual System and its treatment of the spendthrift clause carried no weight, as it was merely a form of internal guidance that was not adopted through the Administrative Procedure Act. *Id.* (citing the *Binder & Binder v. Bainhart*, 481 F.3d 141, 151 (2d Cir. 2007)). Third, she concluded that Connecticut's regulatory standard is entirely consistent with the plain language of 20 C.F.R.

§ 416.1201(a)(1), which defines resources for purposes of SSI. *Id.* Fourth, she found the reasoning in the October 24, 2007 Connecticut Superior Court decision in *Rome v. Wilson-Coker*, Case No. HHBCV064012367S—which held that Connecticut's statutory definition of available assets and regulatory application of that definition to non-self-settled trusts is almost identical to the SSI regulatory definition of resources—to further support DSS's position. *Id.*[2]

II. PRELIMINARY INJUNCTION STANDARD

"When seeking a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the moving party must show: (1) it will suffer irreparable harm absent the injunction and (2) a likelihood of success on the merits." *Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir.1999) (quotation marks omitted). Following an adverse ruling by a State of Connecticut administrative body, a higher standard of "clear" or "substantial" showing of a likelihood of success applies because the entering of a preliminary injunction in this case "will alter, rather than maintain, the status quo." *Tom Doherty Associates, Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995).

III. CONCLUSIONS OF LAW

As required under Federal Rule of Civil Procedure 52(a)(2), the Court issues the following conclusions of law:

A. IRREPARABLE HARM

"[T]he denial of Medicaid benefits has been recognized as *per se* irreparable injury." *Fortmann ex rel. Rubino v. Starkowski*, No. 3:10-cv-1562, 2011 WL 4502939, at *4, 2011 U.S. Dist. LEXIS 115593, at *16, (D. Conn. Jan. 13, 2011) (holding that "[u]npaid nursing home

[2] In *Rome*, the court affirmed a DSS decision to deny Medicaid benefits largely on the reasoning that, if a beneficiary can compel a distribution from a trustee in court, that is equivalent to SSI's requirement that the beneficiary can direct the use of the trust principal. *Rome*, 2007 WL 3318083, at *10-11, 2007 Conn. Super. LEXIS 2779, *28-30 (Conn. Super. Ct. Oct. 24, 2007).

bills, the potential loss of medical assistance at the nursing home, and poor health that plaintiff may suffer in the absence of care, cannot be addressed by a promise of future Medicaid coverage, particularly when the Eleventh Amendment Immunity substantially limits an award of monetary damages against defendant"); *see also Beltran v. Myers*, 677 F.2d 1317, 1322 (9th Cir. 1982). Moreover, "there is Second Circuit and out-of-circuit appellate law holding that the mere *threat* of a loss of medical care, even if never realized, constitutes irreparable harm." *Strouchler v. Shah*, 891 F. Supp. 2d 504, 522 (S.D.N.Y. 2012). Since the decision by the Connecticut administrative body threatens the denial of Medicaid benefits, Plaintiff has satisfied her burden of showing that irreparable harm will exist without the issuance of a preliminary injunction.

B. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiff also must satisfy her burden of establishing a clear showing of a likelihood of success on the merits. Given the applicable law, the Court concludes that the funds once available in the Predecessor Trusts were not available resources for purposes of determining Ms. Simonsen's Medicaid eligibility.

The Medicaid Act prohibits DSS from employing a methodology for determining income and resource eligibility that is more restrictive than the methodology which would be employed under the SSI program, as administered by the United States Social Security Administration (the "SSA"). *See* 42 U.S.C. §§ 1396a(a)(10)(C)(i), 1396a(r)(2). In this case, Plaintiff's Medicaid benefits are being terminated on the basis of DSS's determination that the Predecessor Trusts were available resources for purposes of determining her eligibility. The parties agree that the relevant regulation in the SSI context is 20 C.F.R. § 416.1201, which provides that resources are "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance." The regulation further

provides that: "If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse)." 20 C.F.R. § 416.1201(1). Thus, "[f]or SSI purposes, if an individual has no authority to liquidate a property right, it is not an 'available resource.'" *Brown v. Day*, 434 F. Supp. 2d 1035, 1037-38 (D. Kan. 2006).

The SSA has additional guidance that clarifies the meaning of this phrase, "if an individual has no authority to liquidate a property right, it is not an 'available resource.'" The SSA's Program Operations Manual System ("POMS") "is a primary source of information used by Social Security employees to process claims for Social Security benefits." *POMS Home*, Social Security Administration, https://secure.ssa.gov/apps10/poms.nsf/Home?readform (last visited Dec. 23, 2015). As the Second Circuit recently explained: [3]

> The POMS is a set of guidelines through which the Social Security Administration further construes the statutes governing its operations. We have held that POMS guidelines are entitled to substantial deference, and will not be disturbed as long as they are reasonable and consistent with the statute. But we have declined to defer to the POMS where the plain language of the statute and its implementing regulation do not permit the construction contained within the manuals.

Lopes v. Dep't of Soc. Servs., 696 F.3d 180, 186 (2d Cir. 2012).

Congruent with the relevant regulation, the POMS details the three elements required for something to be considered a resource: an ownership interest; the right, authority, or power to convert it to cash; and the legal right to use it for one's support and maintenance. *See, e.g.*, POMS § SI 01120.010, POMS § SI 01110.100B.1, POMS § SI 01110.100B.3; POMS § SI 01110.115A; POMS § SI 01120.200D. If any one of these elements is missing from an asset, the

[3] While the notice of decision from the Connecticut administrative hearing officer suggests that the POMS was not entitled to deference, *see* Doc. No. 35, at 9, 13, this Court must follow precedent from the Second Circuit and will do so.

SSA will not consider it to be a resource for purposes of determining eligibility for SSI. Nothing in this standard conflicts with the regulation's requirement that a resource be property that an individual owns and could convert to cash to be used for his or her support and maintenance. In fact, it is merely a restatement of the regulation's language. Consequently, all three elements reasonably and consistently described by the POMS as requirements for qualifying an asset as a resource must also exist for an asset to be considered a resource for purposes of determining Medicaid eligibility.

> Applying this standard specifically in the context of trusts, the POMS notes:
>
> > If an individual has legal authority to revoke or terminate the trust and then use the funds to meet his food or shelter needs, or if the individual can direct the use of the trust principal for his or her support and maintenance under the terms of the trust, the trust principal is a resource for SSI purposes. Additionally, if the individual can sell his or her beneficial interest in the trust, that interest is a resource. For example, if the trust provides for payment of $100 per month to the beneficiary for spending money, absent a prohibition to the contrary (e.g., a valid spendthrift clause), the beneficiary may be able to sell the right to future payments for a lump-sum settlement.

POMS SI § 01120.200D.1.a. In short, a trust is a resource under federal SSI methodology if: (1) the beneficiary can revoke or terminate the trust and freely use the funds; (2) the beneficiary can, under the terms of the trust, direct the use of trust principal for his or her support and maintenance; or (3) if the individual can sell his or her beneficial interest in the trust. The POMS, however, further notes that trust beneficiaries generally do not have the power to terminate a trust, and only in rare instances do they have the authority under the trust to direct the use of trust principal, through specific trust provisions either allowing the beneficiary to act on his or her own or by permitting the beneficiary to order actions by the trustee. POMS SI § 01120.200D.1.b.

The Predecessor Trusts in this case do not contain terms providing the beneficiary with any right or authority to direct any payments, and instead empowered the Trustee with the sole discretion to determine when to make a distribution. While it is true that some courts have found that a "support trust," which is a trust that requires the trustee to apply trust income or principal to support the beneficiary, is to be considered an available resource for determining Medicaid eligibility, *see, e.g., Corcoran v. Dep't of Social Services*, 271 Conn. 679, 698-700 (2004), "[t]rust language, such as for the beneficiary's 'benefit,' or 'best interests,' or 'general well being,' broaden the settlor's instructions to the trustee, and go beyond the limits of a support trust," H. Shapo, G. Bogert & G. Bogert, Law Of Trusts And Trustees § 229 (2015).

In addition, the Predecessor Trusts are governed by the laws of Florida, under which a trustee's "power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes." Fla. Stat. Ann. § 736.04117. The terms of the Predecessor Trusts provide that the Trustee's discretion is to be guided by considerations of Plaintiff's health, happiness, maintenance in reasonable comfort, education and best interests. Thus, these trusts were "not limited to specific or ascertainable purposes," and that they "go beyond the limits of a support trust."

Moreover, the Predecessor Trusts contained a valid spendthrift clause.[4] A spendthrift trust "is to be distinguished from a trust for support and from a discretionary trust," Restatement (Second) of Trusts § 152 cmt. b (citations omitted), but it "may or may not also contain discretionary interests," Restatement (Third) of Trusts § 58 cmt. a. A spendthrift clause is a

[4] As relevant to this action, the Predecessor Trusts contained the following clause: "Spendthrift. The interests of beneficiaries in principal or income . . . may not be voluntarily or involuntarily alienated or encumbered. This provision shall not limit the exercise of any power of appointment." Doc. No. 23-2, at 13. While not all states recognize spendthrift clauses, *see* POMS SI § 01120.200B.16, the Predecessor Trusts were established and governed under Florida law, and "Florida law recognizes the validity of spendthrift trusts," *Miller v. Kresser*, 34 So. 3d 172, 175 (Fla. Dist. Ct. App. 2010).

provision in a trust that "prohibits both involuntary and voluntary transfers of the beneficiary's interest in the trust income or principal. . . . In other words, a valid spendthrift clause would make the value of the beneficiary's right to receive payments not countable as a resource." POMS SI § 01120.200B.16.

Consistent with the federal regulation and the other guidelines contained in the POMS, the existence of a spendthrift clause means that a beneficiary cannot revoke or terminate the trust, nor direct the use of trust principal, nor sell his or her beneficial interest in the trust. *See, e.g., Tidrow v. Dir., Missouri State Div. of Family Servs.*, 688 S.W.2d 9, 13-14 (Mo. Ct. App. 1985) (trust containing spendthrift clause and clause giving trustee discretion to disburse funds for beneficiaries' "reasonable comfort" held to be not available for Medicaid purposes); *Miller v. Ibarra*, 746 F. Supp. 19, 26-27 (D. Colo. 1990) (collecting cases to support holding that trust did not count as an available resource for Medicaid eligibility).

In short, if a trust contains a spendthrift clause, the beneficiary has no legal right or authority to access the trust principal, and, therefore, it is not counted as an available resource for SSI, and consequently Medicaid, eligibility purposes. While the total refusal of the trustee to make any payments from a spendthrift trust's interest or principal might, under some circumstances, constitute an abuse of the trustee's discretion as conflicting with the settlor's intent, "[the SSA] do[es] not require litigation to obtain access, the property is not a resource." POMS SI § 01120.010D.7.

Under Florida law, which governed the Predecessor Trusts, the spendthrift clause would be invalid if they provided Plaintiff "with express control to demand distributions from the trust or terminate the trust and acquire trust assets." *Miller v. Kresser*, 34 So. 3d 172, 175 (Fla. Dist. Ct. App. 2010). If such circumstances existed, the Predecessor Trusts also would meet the

requirements articulated in the POMS guidelines to be considered an available resource. However, there are no provisions in the Predecessor Trusts that could reasonably be construed to provide "express control."

As a result, the SSA would not consider the Predecessor Trusts to be available resources for determining SSI eligibility, and thus the Predecessor Trusts may not be considered available resources for determining Medicaid eligibility either. *See Brown v. Day*, 434 F. Supp. 2d 1035, 1037 (D. Kan. 2006) ("In determining income and resource eligibility for Medicaid, states may not employ a methodology which renders an individual ineligible for Medicaid where that individual would be eligible for SSI.").[5] Accordingly, Plaintiff has demonstrated a substantial likelihood of success on the merits.

III. CONCLUSION

Based on the foregoing, the Court concludes that pending final judgment in this case, Plaintiff is entitled to a preliminary injunction which prevents Defendant from terminating her Medicaid benefits.[6] Therefore, Plaintiff's Motion [Doc. No. 19] for Preliminary Injunction is GRANTED; and

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[5] This analysis is consistent with a number of court rulings holding that trusts with terms similar to the trust in this case should not be considered as available resources. *E.g.*, *Chenot v. Bordeleau*, 561 A.2d 891, 894 (R.I. 1989) (trust language requiring that trustee make disbursements it deems "necessary or advisable for [the beneficiary's] comfort, support, and welfare" held "to be an insignificant limitation on the trustee's discretionary powers," and thus the trust should not count as an available resource); *Lang v. Com., Dep't of Pub. Welfare*, 515 Pa. 428, 442-48 (1987) (trust providing that "Trustee shall use so much of the principal as may in her opinion be advisable therefor, for the support, maintenance, welfare, comfort and support of my son" was a discretionary trust limited by a support standard based on beneficiary's situation and thus not an available resource") ; *Oddo v. Blum*, 442 N.Y.S.2d 23, 24 (1981) (holding trust could not be considered available resource even where trustee authorized to invade the principal for beneficiary when "necessary and proper" for her benefit because trustee had discretion "to refuse to invade the trust principal on the ground that the high cost of the nursing home in which [Medicaid applicant] resided would rapidly deplete the trust assets" and "[i]t is not clear whether the testatrix, if aware of the present facts, would desire to pay the immense cost of her sister's care, in preference to having society share the burden").

[6] Consequently, the Court finds Plaintiff's Motion [Doc. No. 19] for Temporary Restraining Order to be moot.

IT IS HEREBY ORDERED that, pending final judgment on the merits or further order of the Court, Defendant is restrained, enjoined, and prohibited from:

(a) terminating Plaintiff's Medicaid benefits;

(b) considering the Predecessor Trusts to be available resources for purposes of determining Medicaid eligibility; and

(c) treating the decanting of funds from the Predecessor Trusts into the Successor Trusts as transfers of assets disqualifying Plaintiff from Medicaid.

SO ORDERED at Bridgeport, Connecticut, this 23rd day of December, 2015.

/s/ Victor A. Bolden
Victor A. Bolden
United States District Judge

PROPOSED REVISIONS TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS AND THE CIVIL FORMS

The Ad hoc Committee on Rules for Mental Health Proceedings has recommended proposed new Rule 1-003.2 NMRA and proposed new Form 4-992 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed rule and form set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 15, 2015, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

[NEW MATERIAL]

1-003.2. Cover sheets for guardianship and conservatorship cases.

A. **Cover sheet required.** A cover sheet substantially in the form approved by the Supreme Court shall be submitted to the court immediately after entry of an order appointing, substituting, or terminating a guardian or conservator. The cover sheet shall be prepared and submitted by the guardian or conservator appointed by the court. Information obtained from the cover sheet is confidential and shall not be disclosed except that it may be disclosed to:

(1) the parties in the proceeding and their attorneys, unless otherwise ordered by the court; and

(2) court personnel for case management, data collection, record keeping, and demographic study purposes.

B. **Updating cover sheet required.** The guardian or conservator must complete and submit to the court a new cover sheet upon the occurrence of any of the following events:

(1) a change of address for the protected person, guardian, or conservator;

(2) a change of place of residence of the protected person; or

(3) the death of the protected person.

[Adopted by Supreme Court Order _____, effective _____.]

[NEW MATERIAL]

4-992. Guardianship and conservatorship cover sheet.

[For use with Rule 1-003.2 NMRA]

GUARDIANSHIP AND CONSERVATORSHIP COVER SHEET

Type or print responses.

THIS SECTION FOR OFFICIAL USE ONLY

Case number: _____ Assigned judge: _____ Free process: Y N

Information for court clerk's use.

A. Information regarding the protected person, guardian, and/or conservator

Protected Person

Name (*Last , first, middle*):_____
Other names (*e.g. maiden name*):_____
Address: _____
City/state/zip code: _____
Date of birth:_____

Guardian

Name (*Last , first, middle*):_____
Other names (*e.g. maiden name*):_____
Address: _____
City/state/zip code: _____
Phone number: _____
E-mail address: _____
Type of Guardian (*Select one*):

_____ Professional
_____ Family
_____ Non-family

Conservator

Name (*Last , first, middle*):_____
Other names (*e.g. maiden name*):_____
Address: _____
City/state/zip code: _____
Phone number: _____
E-mail address _____

Type of Conservator (*Select one*):

_____ Professional
_____ Family
_____ Non-family

B. Other appointed or designated agents (*if known*)

(*Please provide the following information, if known, for each appointed or designated agent. You may attach additional pages if necessary.*)

Name (*Last , first, middle*):_____ _____
Other names (*e.g. maiden name*):_____
Address: _____
City/state/zip code: _____
Phone number: _____
E-mail address: _____
Type of agent (*Select one*):

_____ Mental health treatment guardian
District Court Case No. (*if known*): _____
_____ Surrogate healthcare decision maker
_____ Power of attorney
_____ Other (*please describe*): _____

C. Type of protective proceeding

(*Select one*)

_____ Adult Guardianship
_____ Adult Conservatorship
_____ Adult Guardianship and Conservatorship
_____ Other (*please describe*): _____

D. Reason(s) for incapacity

(*Select all that apply*)

_____ Dementia
_____ Brain injury
_____ Developmental disability
_____ Mental illness
_____ Drug and or alcohol abuse
_____ Other (*please describe*): _____

I affirm under penalty of perjury under the laws of the State of New Mexico that the information contained herein is complete and accurate to the best of my knowledge and belief. I acknowledge my responsibility under Paragraph B of Rule 1-003.2 NMRA to file a new cover sheet upon the appointment of a different guardian or conservator, a change of address for the protected person, guardian, or conservator, a change of place of residence for the protected person, the death of the protected person, or the termination of the guardianship or conservatorship.

_____
Signature of [Guardian] [Conservator] [Guardian and Conservator]

_____

Date of signature

[Approved by Supreme Court Order No. _____, effective _____.]

PROPOSED NEW RULES REGARDING COURTROOM CLOSURE AND REVISIONS TO THE RULE PROVIDING GUIDELINES FOR RECORDING COURTROOM PROCEEDINGS

The Joint Committee on Rules of Procedure for New Mexico State Courts has recommended for the Supreme Court's consideration proposed new rules regarding courtroom closure, Rules 1-104, 2-114, 3-114, 5-124, 6-116, 7-115, 8-114, and 12-322 NMRA, and proposed amendments to Rule 23-107 NMRA, regarding guidelines for recording courtroom proceedings.

If you would like to comment on the proposed new rules or proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 6, 2016, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

[NEW MATERIAL]

Rule 1-104. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, and court employees and security personnel. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Courtroom closure without motion.**

(1) Unless otherwise ordered by the court, the following proceedings shall be closed automatically:

(a) hearings in adoption proceedings as provided by Subsection C of Section 32A-5-8 NMSA 1978;

(b) proceedings to detain a person with a threatening communicable disease as provided by Subsection J of Section 24-1-15 NMSA 1978;

(c) proceedings for testing as provided by Subsection B of Section 24-2B-5.1 NMSA 1978;

(d) proceedings commenced for the appointment of a guardian for an alleged incapacitated person, as provided in Subsection K of Section 45-5-303 NMSA 1978; and

(e) proceedings commenced for the appointment of a conservator, as provided in Subsection O of Section 45-5-407 NMSA 1978.

(2) The court shall file a written order setting forth the statutory authority for any automatic courtroom closure under this paragraph.

C. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A written motion for courtroom closure shall be filed and served at least forty-five (45) days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court.

(4) ***Reply.*** A party may file a written reply within fifteen (15) days after service of the written response, unless a different time period is ordered by the court.

(5) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph D of this rule. The court may grant a party additional time to reply to a response filed by a non-party.

(6) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses or replies.

D. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence or argument tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

E. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings

underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

However, certain statutes include exceptions to the general rule that courtroom proceedings should be open to the public and provide that specific types of courtroom proceedings should be closed. The court may close the proceedings listed in Subparagraph (B)(1) of this rule without following the procedures set forth in Paragraphs C through E of this rule, provided that the court must enter a written order setting forth the statutory authority for the closure.

Aside from entire categories of cases that may be closed in accordance with statutory authority, numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, NMSA 1978, § 27-7-29(A) (providing that "[a]ll records . . . created or maintained pursuant to investigations under the Adult Protective Services Act . . . shall be confidential and shall not be disclosed directly or indirectly to the public"); NMSA 1978, § 43-1-19 (limiting the disclosure of information under the Mental Health and Developmental Disabilities Code); committee commentary to Rule 1-079 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential unless the statute expressly provides that the proceedings shall be closed. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (C)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph E of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph D of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph E, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (alteration in original) (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening

observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

Except for proceedings that are closed automatically under Paragraph B, this rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (C)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph D, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice. [Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

Rule 2-114. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, and court employees and security personnel. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A motion for courtroom closure shall be filed and served at least twenty (20) days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court. A reply is not permitted without leave of the court, which may be granted upon a showing of good cause.

(4) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule.

(5) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses.

C. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence tendered to the court for an in camera review that is not ordered to be disclosed shall be returned to the party.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, committee commentary to Rule 2-112 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [magistrate] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice. [Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

Rule 3-114. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, and court employees and security personnel. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A motion for courtroom closure shall be filed and served at least twenty (20)

days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court. A reply is not permitted without leave of the court, which may be granted upon a showing of good cause.

(4) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule.

(5) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses.

C. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence or argument of record tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

Committee commentary. — New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, committee commentary to Rule 3-112 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for

proceedings involving information designated by statute as confidential. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [metropolitan] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice. [Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

Rule 5-124. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, court employees and security personnel, and victims and victims representatives as defined in the Victims of Crime Act, Section 31-26-3 NMSA 1978. This rule does not affect the court's inherent

authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A written motion for courtroom closure shall be filed and served at the time of arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court.

(4) ***Reply.*** A party may file a written reply within fifteen (15) days after service of the written response, unless a different time period is ordered by the court.

(5) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule. The court may grant a party additional time to reply to a response filed by a non-party.

(6) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses or replies.

C. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence or argument tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary.—Both the United States Constitution and the New Mexico Constitution guarantee a criminal defendant the right to a public trial. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. The New Mexico Constitution also guarantees certain crime victims "the right to attend all public court proceedings the accused has the right to attend." N.M. Const. art. II, § 24; *see also* NMSA 1978, Section 31-26-4(E) (1999) (same). Additionally, the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566-67 (1980). Consistent with these constitutional rights, New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Certain statutes include exceptions to the general rule that courtroom proceedings should be open to the public and provide that specific types of courtroom proceedings should be closed. *See, e.g.*, NMSA 1978, § 24-2B-5.1(B) (testing to identify the human immunodeficiency virus). Additionally, numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, NMSA 1978, § 43-1-19 (limiting the disclosure of information under the Mental Health and Developmental Disabilities Code); committee commentary to Rule 5-123 NMRA (listing statutory confidentiality provisions). Despite these statutory provisions, this rule does not authorize automatic courtroom closure for any type of criminal proceeding. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (alteration in original) (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably

entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice. [Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

Rule 6-116. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, court employees and security personnel, and victims and victims representatives as defined in the Victims of Crime Act, Section 31-26-3 NMSA 1978. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A motion for courtroom closure shall be filed and served at least twenty (20) days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court. A reply is not permitted without leave of the court, which may be granted upon a showing of good cause.

(4) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule.

(5) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses.

C. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence tendered to the court for an in camera review that is not ordered to be disclosed shall be returned to the party.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

Committee commentary. — Both the United States Constitution and the New Mexico Constitution guarantee a criminal defendant the right to a public trial. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. The New Mexico Constitution also guarantees certain crime victims "the right to attend all public court proceedings the accused has the right to attend." N.M. Const. art. II, § 24; *see also* NMSA 1978, Section 31-26-4(E) (1999) (same). Additionally, the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566-67 (1980). Consistent with these constitutional rights, New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, committee commentary to Rule 6-114 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [magistrate] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice. [Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

Rule 7-115. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, court employees and security personnel, and victims and victims representatives as defined in the Victims of Crime Act, Section 31-26-3 NMSA 1978. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A motion for courtroom closure shall be filed and served at least twenty (20) days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court. A reply is not permitted without leave of the court, which may be granted upon a showing of good cause.

(4) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule.

(5) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses.

C. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. For cases in which the metropolitan court is a court of record, any evidence or argument tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

Committee commentary. — Both the United States Constitution and the New Mexico Constitution guarantee a criminal defendant the right to a public trial. *See* U.S. Const. amend. VI; N.M. Const.

art. II, § 14. The New Mexico Constitution also guarantees certain crime victims "the right to attend all public court proceedings the accused has the right to attend." N.M. Const. art. II, § 24; *see also* NMSA 1978, Section 31-26-4(E) (1999) (same). Additionally, the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566-67 (1980). Consistent with these constitutional rights, New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, committee commentary to Rule 7-113 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [metropolitan] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice. [Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

Rule 8-114. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, and court employees and security personnel. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A motion for courtroom closure shall be filed and served at least twenty (20) days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court. A reply is not permitted without leave of the court, which may be granted upon a showing of good cause.

(4) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule.

(5) ***Continuance.*** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses.

C. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant

to the motion. Any evidence tendered to the court for an in camera review that is not ordered to be disclosed shall be returned to the party.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

Committee commentary.—Both the United States Constitution and the New Mexico Constitution guarantee a criminal defendant the right to a public trial. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. Additionally, the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566-67 (1980). Consistent with these constitutional rights, New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, committee commentary to Rule 8-112 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [municipal] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted).

Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty.*, 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice. [Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

Rule 12-322. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the appellate court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, court employees and security personnel, and victims and victims representatives as defined in the Victims of Crime Act, Section 31-26-3 NMSA 1978. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court.*** If the appellate court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity.*** A written motion for courtroom closure shall be filed and served within fifteen (15) days after service of notice setting a matter for hearing or oral argument, unless upon good cause shown the appellate court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court. A reply is not permitted without leave of the appellate court, which may be granted upon a showing of good cause.

(4) ***Response by non-party.*** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule.

(5) ***Continuance.*** In the appellate court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses.

C. **Public hearing.** Unless the court denies the motion for courtroom closure on the pleadings, the court shall hold a public hearing on the motion for courtroom closure.

(1) ***Notice of hearing.*** The public shall be given notice of the date, time, and place of the hearing. The notice shall be posted either on the court's public website or on a bulletin board adjacent to the clerk's office and accessible to the public. In addition, the party seeking to close the hearing shall, at the time of filing of the motion, deliver a copy of the motion to all persons or entities who identify themselves to the clerk as wanting to receive copies of such notices. The court shall maintain a list of persons or entities that have requested to receive notice of such hearings. The party seeking closure shall also timely deliver a copy of the notice of hearing on the same persons or entities. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review.*** Although the appellate court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence or argument tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the appellate court's findings underlying the order. The appellate court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Both the United States Constitution and the New Mexico Constitution guarantee a criminal defendant the right to a public trial. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. The New Mexico Constitution also guarantees certain crime victims "the right to attend all public court proceedings the accused has the right to attend." N.M. Const. art. II, § 24; *see also* NMSA 1978, Section 31-26-4(E) (1999) (same). Additionally, the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566-67 (1980). Consistent with these constitutional rights, New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, committee commentary to Rule 12-314 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the appellate court must still engage

in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [appellate] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id.* ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed.

This rule shall not diminish the appellate court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice.

[Adopted by Supreme Court Order No. _____, effective _____.]

23-107. Broadcasting, televising, photographing, and recording of court proceedings; guidelines.

The broadcasting, televising, photographing, and recording of court proceedings in the Supreme Court, Court of Appeals, district and metropolitan courts of the State of New Mexico are hereby authorized in accordance with the guidelines promulgated herewith which contain safeguards to ensure that this type of media coverage shall not detract from the dignity of the court proceedings or otherwise interfere with the achievement of a fair and impartial hearing.

GUIDELINES:

A. **Discretion of [~~judges~~] the court.** Live coverage of proceedings shall not be limited by the objection of counsel or parties, except that the [~~court~~] Supreme Court reserves to the individual courts the right to limit or deny coverage for good cause.

(1) Media coverage in the courts is subject at all times to the authority of the judge or judges to:

(a) control the conduct of the proceedings before the court;

(b) ensure decorum and prevent distractions; and

(c) ensure fair administration of justice in the pending cause.

(2) The [~~presiding district judge~~] court has sole and plenary discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, relocated witnesses, and juveniles.

(3) Neither the jury nor any member of the jury may be filmed in or near the courtroom, nor shall the jury selection process be filmed.

(4) The judge has discretionary power to forbid coverage whenever the judge is satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial.

(5) Audio pickup, broadcast, or recording of a tender of evidence offered by a party for the purpose of determining admissibility made before the judge out of the hearing of the jury is not permitted.

(6) Audio pickup, broadcast, photography, televising, or recording of a conference in the courtroom between members of the court, court and counsel, co-counsel, or counsel and client is not permitted.

B. **Notice.** The broadcasters, photographers, and recorders shall notify the clerk of the particular court at least twenty-four (24) hours in advance of coverage of their desire to cover the trial. Each trial judge may, in the judge's discretion, lengthen or shorten the time for advance notice for coverage of a particular trial.

C. **Decorum.** The decorum and dignity of the court, the courtroom, and the proceedings must be maintained at all times. Court customs must be followed, including appropriate attire. Movement in the courtroom shall be limited, except during breaks or recess. The changing of tapes, film magazines, film, and similar actions during the proceedings shall be avoided.

D. **Standards.** The media shall maintain high journalistic standards regarding the fairness, objectivity, and quality of the coverage allowed under these guidelines.

E. **Equipment and personnel.** Unless otherwise agreed upon by the court, equipment and personnel within the courtroom or hearing room shall be limited as follows:

(1) All equipment shall be operated behind the rail.

(2) Not more than one portable television camera operated by not more than one camera person shall be permitted. Only natural lighting shall be used. Cameras shall be quiet and shall be placed and operated as unobtrusively as possible within the courtroom at a location approved by the court. The cameras shall be in place at least fifteen (15) minutes before the proceedings begin.

(3) Not more than two audio systems shall be permitted. All running wires shall be securely taped to the floor. Multiple radio feeds shall be provided by a junction box.

(4) Not more than two still photographers, utilizing not more than one still camera each, shall be permitted. The cameras must not produce any distracting sounds. Only natural lighting shall be used. Still photographers shall remain in one place during the proceedings, but they may shift positions during breaks or recess.

(5) Tape recorders may be used by members of the media, so long as they do not constitute a distraction during the proceedings.

(6) Any pooling arrangements necessary shall be the sole responsibility of the media and must be concluded prior to coverage without calling upon the court to mediate any dispute regarding appropriate media and personnel.

F. **Inapplicability to individuals.** The privileges granted by these rules may be exercised only by persons or organizations that are part of the news media.

G. **Objections limited.**

(1) An appellate court shall not exercise its appellate or supervisory jurisdiction to review at the request of any news media persons or organization seeking to exercise a privilege conferred upon them by these rules, any order or ruling of any judge under these rules.

(2) Any party, or any person or entity with a sufficient interest, may [~~request, or~~] object to[~~,~~] cameras in the courtroom by [~~written~~] filing a motion for courtroom closure under Rule

1-104 NMRA, Rule 3-114 NMRA, Rule 5-124 NMRA, Rule 7-115 NMRA, or Rule 12-318 NMRA. [~~which may be supported by affidavits, which motion shall be filed not later than fifteen (15) days prior to trial. No other evidence shall be presented.~~

~~The trial court shall consider the motion and grant or deny the same. The trial judge shall state the judge's reasons for the judge's ruling on the record.~~]

H. **Impermissible use of media material.** None of the film, videotape, still photographs, or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent or collateral thereto, or upon any retrial or appeal of such proceeding.

I. **Other courts.** The broadcasting, televising, photographing, and recording of court proceedings in courts other than the appellate, district and metropolitan courts of New Mexico is prohibited.

[As amended, effective September 1, 1989; August 17, 1999; as amended by Supreme Court Order No. _____, effective _____.]

Update on Special Needs Planning
2016

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UPDATE ON SPECIAL NEEDS PLANNING 2016

I. INTRODUCTION

The cost of care for many disabled persons can be prohibitive and is simply out of reach for most people to afford privately. Because many government-funded programs in the United States today provide substantial benefits, and in many cases are the only available programs for disabled persons, access to these services is critical. However, the requirements for qualifying for these benefits often thwart the efforts of families to provide support to their disabled loved ones. Special Needs Trusts, also called Supplemental Needs Trusts, are the building blocks for accessibility. These trusts are designed to provide assets for the care and comfort of disabled beneficiaries without jeopardizing their access to programs, funds and/or medical benefits that may be available to them. Additional programs, such as the ABLE Act, have been adopted in the past two years to enhance the lives of people with disabilities.

To qualify for government benefits for disabled individuals, a person must meet the definition of "disabled." A disabled person, according to the Social Security Administration, is a person who is over the age of 65, blind or unable to do any substantial gainful activity due to severe physical or mental impairments that will result in death or which have lasted for more than one year or will continue for not less than one year. 42 U.S.C. § 423(d) (l) (A). "Substantial gainful activity" is the ability to do work that produces earnings. "Physical or mental impairments" are disabilities that appear on the Social Security Administration Listing of Impairments. If drug addiction or alcoholism are contributing factors to the disability, and if the individual does not accept treatment for addiction, eligibility can be suspended. Social Security publishes the Program Operations Manual System to help caseworkers determine disability.[1]

[1] The "POMS" are the regulations described under the Program Operations Manual System, which are written to instruct Social Security caseworkers in the various offices throughout the United States. One can access the POMS pertaining to Supplemental Security Income at https://secure.ssa.gov/poms.nsf/Home!readform. The POMS that are pertinent to the subject of this paper are found in the SI-Supplemental Security Income section. While the POMS do not carry the weight of regulations in the Tenth Federal Circuit (See *Ramey v. Reinertson*, 268 F.3d 955 (10th Circuit 2001)), they are very helpful and the most detailed policy guidelines that exist in the area of special needs trusts.

Once a disability is established, the type of benefit available will depend on additional criteria. Some programs, such as Social Security Disability Income ("SSDI"), base the benefit on the earnings of the worker prior to her disability. With this benefit comes Medicare, which is a medical insurance program available to all workers who are disabled or to most people who have attained age 65. Receipt of SSDI and Medicare depends exclusively on disability or age and prior work history. There is no limit to unearned income or assets that can be owned by an SSDI or Medicare recipient. In contrast, programs such as Supplemental Security Income ("SSI") and Medicaid are "means-based" programs, which measure the current income and resources of the disabled person to establish eligibility. In order to access these benefits, the recipient must not only be aged, sick and/or unable to work, but very, very poor. If additional assets become available to an SSI or Medicaid recipient, the benefits will be curtailed until those assets are used up. When the excess assets are gone, the disabled person can reapply for the benefits.

Government benefits for people with disabilities include cash payments and health care. SSI and SSDI provide cash for disabled individuals. For many recipients, this is the only monthly cash that they receive. The primary government health care programs are Medicare and Medicaid.

Medicare provides coverage for acute care, such as hospitalization and some limited rehabilitation. Under the Medicare law passed in 2003, prescriptions were covered beginning in 2006.[2] The Patient Protection and Affordable Care Act of 2010 ("ACA") increased the benefit of this prescription drug coverage by closing the gap for prescription drug costs, called the doughnut hole.[3] Medicare recipients may also have access to private health insurance, which often pays for prescriptions and doctor visits. Medicare is administered directly by the federal government.

[2] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, www.medicare.gov. Medicare and Medicaid are administered by the Centers for Medicare and Medicaid Services ("CMS") under the United States Department of Health and Human Services.
[3] 42 U.S.C. § 1395w-114A.

Medicare does not exclude anyone with a pre-existing condition. However, Medicare does not cover the cost of long term custodial care. Long term care insurance will pay for custodial care, but is not available for someone who is already disabled.

Medicaid is the only government program in the United States that provides for long term skilled nursing care for disabled persons other than Veterans Affairs. Medicaid pays for prescriptions, therapy, and doctor visits as well as custodial care. Medicaid, while a federal program, is administered by the states. Therefore, a Medicaid recipient who moves from one state to another state will have to reapply for Medicaid services in the new state of domicile. Regulations differ from one state to the next. In New Mexico, Medicaid, which is now called Centennial Care, provides funding for various programs, which include HMO services through Molina, Blue Cross and Blue Shield, Presbyterian and United Health Care, institutional care in nursing homes and other facilities, financial assistance for the payment of Medicare premiums, Total Community Care, which provides home-based services for the elderly (available only in Bernalillo, Valencia and Sandoval counties), and the Developmentally Disabled ("DD Waiver"). In 2016, Mi Via and Medically Fragile programs, which provide community based services for disabled individuals of all ages, are provided by Centennial Care providers.[4] In order to qualify for these benefits, a recipient must be disabled and must be essentially indigent. There is a limitation on the amount of income that a Medicaid recipient can receive each month ($2,199.00 plus $20.00 in 2016), and the total amount of countable resources that a Medicaid recipient can have in any one month is $2,000.

Implementation of the Affordable Care Act has reduced the need for some of these government programs for some beneficiaries. For example, because health insurance companies will no longer be able to deny coverage on the basis of a pre-existing condition, many people with disabilities whose needs are primarily medical, such as medications and therapy maintenance, can purchase health insurance and no longer need Medicaid for those services.

[4] Information about these services can be found at http://www.state.nm.us/hsd/mad.

As a result of the ACA in New Mexico, Centennial Care, is now offered to individuals and families whose household income was less than 138% of the Federal Poverty Level ("FPL"). The only thresholds for eligibility for this coverage are age, 19 through 64, and low income. The applicant does not have to be disabled and can own unlimited resources, which are not counted. This is called Medicaid Expansion under the ACA.

The dilemma for families with disabled family members has always been how to provide a decent and meaningful lifestyle for their loved one while at the same time guaranteeing access to crucial government benefits. Historically, families have tried various methods to protect the benefits for a disabled family member when additional assets may have been available that would cause disqualification. They might intentionally disinherit the loved one. They might attempt to create oral trusts or other arrangements with surviving family members. These methods have often had heart breaking and cruel results or can be ineffective or fraudulent. On the other hand, many relatives cannot bring themselves to disinherit a disabled beneficiary. As a result, the disabled beneficiary receives a gift or a share of an estate outright, and thus loses her government benefits until the gift or inheritance is used up. Planning with Special Needs Trusts can solve this dilemma.

An exasperating though common occurrence is a disabled child of a deceased or retired parent receiving automatically a lump sum payment from Social Security that is the accumulated SSDI benefit of the parent. The child is entitled to this benefit, which is a continuation of the parent's Social Security benefit. However, because Social Security may have taken two years to compute the benefit of the parent, it arrives as a lump sum that is far more than $2,000. The receipt of this payment, though received because the child is disabled, will cause ineligibility until the excess resource is used up. Planning with Special Needs Trusts can solve this dilemma.

Some disabilities are the result of someone else's negligence. In these cases, the disabled person may recover damages. However, the injured person may require lifetime assistance at enormous cost, which may be well beyond the amount of the recovery. Treatment of the effects of the injury necessitates government-provided benefits. Therefore, even though a recovery may provide

substantial assets, the recovery itself can put access to these benefits at risk.[5] Planning with Special Needs Trusts can solve this dilemma.

Finally, one can never predict whether or not a future beneficiary may become disabled. Estate planners can build language into their documents that provides for contingent Special Needs Trusts in the same manner that most documents now provide for contingencies such as minority trusts.

The reality for people with disabilities in the United States is that to access crucial and necessary services, the disabled person must be impoverished, and must remain impoverished, in order to maintain eligibility for those services.

II. HOW THE GOVERNMENT BENEFITS SYSTEMS WORK

A. The Basics

Planning for disabled beneficiaries requires a basic understanding of how government benefits systems work. These programs disburse benefits to millions of people in the United States every month. Yet, most people, and, unfortunately, most professionals, do not have a grasp of the features and the distinctions among them. The names of the programs are very similar, which makes it more confusing. While access to the means-based programs requires special planning, it is important to know how other programs interrelate and in some cases complement the means- based programs. To help in that understanding, we have prepared two simple charts to illustrate and compare three programs provided through Social Security and to compare Medicare and Medicaid.

[5] For more information about how to protect public benefits for disabled plaintiffs who recover damages throughout the United States, contact the Special Needs Alliance, www.specialneedsalliance.org .

Comparison of Three Social Security Programs

SSI	SSA	SSDI
Supplemental Security Income	Social Security	Social Security Disability Income
Disability	Retirement	Disability
Cash + Medicaid	Cash	Cash + Medicare (After 2 years)
No work history	Work history	Work history
Income Cap - $733/month in 2016	Income Cap - $15,720/yr in 2016, if under age 66	Income Cap - $1,130/month in 2016
Earned & unearned income	Earned income	Earned income
Resource cap - $2000.00	No resource cap	No resource cap
Minimum cash benefit	Insurance	Insurance
Food and shelter	Unrestricted	Unrestricted
State supplements (Not NM)	Uniform in all states	Uniform in all states
US citizens only	All workers	All workers
May also have SSDI	May not have SSI or SSDI	May also have SSI
No dependent coverage	Covers dependents	Covers dependents

Comparison of Medicaid and Medicare

	Medicaid	Medicare
Program:	Health Care	Health Insurance A Hospital B Doctor Visits C HMO plans D Prescriptions
Administered by:	States	Federal
Eligibility:	Must Qualify	Entitlement
Financial and Disability Qualifications:	ACA Expansion Income of Household only Disability Services Income and Resources	Age **or** Disability
Covers:	Basic Medical Care Some in-home care programs; Skilled nursing care; Long Term care; Prescriptions	Hospitalization; 100 days maximum rehabilitation; Prescriptions
Contribution:	Reimbursement required	Premiums and co-pay
Estate Recovery:	Yes	No

B. Means-Based Programs

In 1965, President Johnson signed the bills that created a health insurance program for retired Americans, Medicare, and a health care program for needy families, Medicaid. The bill was an amendment to the Social Security Act. It had originally been proposed by Harry Truman in 1945. In 1972, President Nixon signed the Social Security Amendments of 1972 which created the Supplemental Security Income ("SSI") system. Although the benefits under Medicaid and SSI are different, the rationales for the two systems are quite similar, and both find their statutory basis in the Social Security Act. SSI provides minimal cash payments each month that are designated to provide for food and shelter. In order to maintain eligibility for SSI, a recipient cannot receive income from any source in excess of $733.00 per month in 2016. Income, according to the SSI rules, is anything that "comes in" to the recipient in any month. At the end of the month, income that is not used up converts to a "resource." Thus, a resource can be accumulated income. An SSI recipient is not allowed to own resources that are available to be spent on food and shelter in excess of $2000.00. Income and resources are measured independently. The analysis for Medicaid eligibility is quite similar, although the income threshold is higher. In New Mexico, for most Medicaid programs, the income threshold in 2016 is $2,199.00 plus $20.00 per month.

Some income and some resources are exempt from the eligibility calculations. Non-countable income includes other means-based payments such as food stamps, medical care and services, income tax refunds, loans, and any item that if retained would not be a countable resource. Exempt resources include the personal residence of the recipient; one vehicle, if it is needed to provide transportation to work, to medical services or is specially outfitted for the disability; household contents, such as computers, electronics, physical training equipment, hot tubs and ordinary furnishings for living; life insurance with a face value of less than $1,500.00 and irrevocable burial plans. Thus a disabled adult who owns a $400,000 house,[6] a $60,000

[6] The Deficit Reduction Act of 2005, signed by President Bush on February 8, 2006, requires that Medicaid eligibility shall be denied to applicants who have more than $500,000 in equity in their home. New Mexico has increased this figure to $828,000 in 2016.

specially outfitted van, whose life is insured by a $2 million term life insurance policy, and who has limited income, could qualify for SSI.

Income and resources of family members can be deemed to a disabled family member under the SSI rules. This deeming concept is an odd one, but the rationale is that since SSI benefits are to provide food and shelter, if an SSI recipient is receiving some of those items from another source, then the ability of that source to provide those items is "deemed" to the SSI recipient, as if the SSI recipient were able to provide these services by herself. For example, in order to maintain SSI eligibility for a minor disabled child, a family which is supporting three children, one of whom is disabled, will be limited in the total amount of income that the family may earn each month if it wants to protect the disabled child's benefits. A portion of the family's income will be deemed to belong to the SSI recipient. If the family earns too much income, the disabled minor child will not be eligible for SSI. There is a similar analysis for deeming resources.

But why is this significant? The government-provided cash benefit under SSI is paltry, a maximum of $733.00 per month in 2016. The amount of the SSI benefit is so small that maintaining SSI eligibility hardly seems to be a worthy goal. The prize that makes the quest worth pursuing is Medicaid. In many states, including New Mexico, eligibility for SSI categorically results in Medicaid eligibility. For many disabled individuals, such as disabled children, disabled adults who have no work history, and disabled adults whose work history does not provide an SSDI benefit at all, or one that is below $733.00 per month, SSI provides the gateway to the substantial medical benefits of Medicaid. As the charts demonstrate, no other government benefit besides Medicaid provides comprehensive, long term custodial and medical care. Therefore, observing the qualification criteria for SSI will enable a disabled beneficiary to receive medical care that she may not be able to obtain from any other source. If an individual is unable to qualify economically for SSI, she may be able to apply directly for Medicaid. The eligibility requirements for Medicaid are also means-based, requiring that the individual have minimal countable income and resources, but there are not the same deeming rules as there are with SSI.

C. Additional Related Programs

The ACA provides that health insurance coverage cannot be denied to anyone with a pre-existing condition, beginning in 2014. Access to basic health insurance has allowed some people with disabilities to opt out of the Medicaid system. Additionally, the ACA has expanded Medicaid health coverage to low income adults in New Mexico.

In December, 2014, Congress passed the Stephen Beck, Jr., Achieving a Better Life Experience Act ("ABLE") in December, 2014. The federal law amends Section 529 of the Internal Revenue Code as a new Section 529A. Only people whose disability was established prior to age 26 can open an ABLE account. Anyone can contribute to an ABLE account, but the total of all contributions in any one year cannot exceed $14,000, the annual gift tax exclusion amount. The funds in the account can grow income tax deferred, similar to an IRA or 529 plan. Distributions for the benefit of the disabled beneficiary can be made, income tax free, for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight, monitoring, funeral and burial expenses, and other expenses approved by the US Secretary of the Treasury. Up to $100,000 in the ABLE account is excludable for SSI purposes. The beneficiary may direct the investments of the ABLE account, limited to twice a year. States must elect to participate in the ABLE program. There is a limit of one ABLE account per beneficiary. Medicaid, which is described as a creditor in the statute, gets paid back at the death of the beneficiary for any amounts paid by the state for the care of the beneficiary after the establishment of the account. Enabling legislation was passed by the 2016 session of the New Mexico Legislature, and was signed by the Governor on March 3, 2016. Many other states have passed enabling legislation as of July, 2015. The National Arc keeps a chart of all of the states that have passed the legislation and updates on other states that are working on it. You can access this information at http://www.thearc.org/what-we-do/public-policy/policy-issues/able-legislation-by-state.

In December 19, 2014, President Obama signed the Disabled Military Child Protection Act, which is Section 642 of the National Defense Authorization Act of 2015. This Act allows the disabled children of retired military personnel to have survivor benefits under military pensions be directed to a Special Needs Trust for the child rather than to the child herself. A written statement designation the Special Needs Trust as the beneficiary should be sent to: Defense Finance and Accounting Services, Retired and Annuity Pay, PO Box 7130, London, KY 40742-7130. Guidelines were issues by the Department of Defense 2015, and can be found at http://www.moaa.org/uploadedFiles/Content/Take_Action/Top_Issues/Spouse_and_Family/SNTPolicyFinal31Dec15.pdf.

III. REQUIREMENTS OF SPECIAL NEEDS TRUSTS

A properly drafted Special Needs Trust preserves and shelters assets for the benefit of a disabled person so that she can obtain means-based benefits and have additional comforts, enjoyment, education, entertainment and medical care not otherwise provided by the government programs. In order for a Special Needs Trust to qualify as a non-countable resource, it must be written and its terms express. All distributions of income and/or principal must be in the discretion of the trustee. The beneficiary cannot be given the power to demand income or principal. The Trustee must be prohibited from making any distribution that would jeopardize the recipient's benefits. The Special Needs Trust can delineate those items or categories for which distributions are proper. The language should never require distributions for health, support, food or shelter. The disabled individual must be the sole beneficiary of the trust during her lifetime. A Special Needs Trust must be irrevocable.

A. Third Party-Settled Trusts

The least problematic Special Needs Trust is the third party-settled trust which can be either an inter vivos irrevocable trust or a testamentary trust.[7] If the Special Needs Trust is a testamentary trust, it is settled law that it will not be counted as a resource for a disabled beneficiary.[8] A third party-settled Special Needs Trust can provide for a testamentary special

[7] The POMS exclude third party trusts from special scrutiny. POMS SI 01120.200 D2.

[8] Transmittal 64, issued by Sally Richardson of the Health Care Financing Administration (now CMS) in November, 1994, states that the definition of "trust" does not include a trust established by Will. Section 3259.1.A.1.

power of appointment for the beneficiary, or can provide that the trust be distributed to the chosen remainder beneficiaries of the grantor at the death of the beneficiary. The corpus of a third party-settled Special Needs Trust can be preserved for future beneficiaries. In New Mexico, there is no need for independent review of a third party-settled Special Needs Trust by Medicaid.

B. Self-Settled Trusts

In 1993, Congress provided in 42 U.S.C. § 1396p(d)(3) that a person could not attain Medicaid eligibility by transferring her own assets to an inter vivos trust, even if the trust was irrevocable and the Medicaid applicant had no further control over the assets, **unless** the transfer took place more than 5 years before the Medicaid application.[9] A transfer to the trustee within the 5 year period results in the assets being attributed to the applicant for the period of time that it takes to use up those assets to pay for the care of the applicant. This "penalty period" can put the applicant in the worst possible situation, i.e., not having the assets to pay for care, but being penalized as if the applicant has the assets, and therefore being unable to obtain Medicaid.[10] Transferring one's own assets to a trust as a planning method 5 years in advance of need is only feasible when the disability can be planned for, such as with a Parkinson's patient or an Alzheimer's patient. For victims of accidents or disabling conditions from birth or with an unpredictable onset, this is not an option. For example, under SSI rules, a plaintiff in a personal injury suit is deemed to have constructive ownership of any recovery, even if the court establishes a Special Needs Trust. Because these assets are attributed to the plaintiff, if the plaintiff is disabled, the recovery would prevent eligibility for much needed means-based benefits. However, under 42 U.S.C. § 1396p (d)(4), two types of safe harbor trusts are described that can relieve this dilemma for SSI and Medicaid eligibility. Transfers of the disabled person's assets to these safe-harbor statutory self-settled trusts are exempt from the transfer penalty.

[9] The Deficit Reduction Act of 2005 extended this five year look back period for trusts to all transfers of any sort.

[10] The Deficit Reduction Act of 2005 mandates that the date of any transfer within the past five years will be deemed to be the date of the application for Medicaid, which means that the penalty period for a transfer begins on the date of application, not on the date of the transfer.

1. "(d)(4)(A) Trusts"

The first type of trust is provided for in 42 U.S.C. § 1396p(d)(4)(A) and is commonly called a "d4A" trust. Because the d4A trust is funded with the beneficiary's own assets, the statute requires that at the death of the beneficiary, the remaining assets in the trust must be used initially to reimburse any state government that provided Medicaid to the beneficiary. Therefore, this trust is often called a "payback trust."[11] In addition to the payback requirement, the d4A trust must be irrevocable; it can be created **only** by a parent, grandparent, court or guardian; and the disabled beneficiary must be younger than 65. Funds of the beneficiary transferred to the trust after age 65 will not be exempt transfers. Anyone other than the disabled person can be the trustee of the trust. The trust can provide that after the beneficiary's death, once Medicaid is reimbursed, the remaining balance of the trust fund can be distributed to the intended beneficiaries of the disabled person.

The beneficiary cannot be the grantor, even though the assets being transferred to the trust are attributed to the beneficiary. This limitation on permissible grantors can be cumbersome. However, H.R. 670, the Special Needs Trust Fairness Act of 2015 was introduced on February 3, 2015, in the House of Representatives. One of its provisions is to add the beneficiary as a qualified grantor of a (d)(4)(A) Special Needs Trust. This bill was approved by the Senate on September 10, 2015. However, the House failed to act on it by the end of the session in 2015. The bill is still alive and is being promoted by Representative GT Thompson of Pennsylvania. If a disabled beneficiary is incompetent, it is a simple matter to have a Conservator appointed to create the trust. However, a disabled adult who has no living parent or grandparent and who is competent

[11] 42 USC 1396p(d)(4)(A) states: **(4)** This subsection shall not apply to any of the following trusts: **(A)** A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c (a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

has more difficulty complying with the statute.[12] If the funds are not the result of a settlement by which a court could create the trust, and there are no parents or grandparents, the disabled person must submit to a limited conservatorship to fund the trust in order to comply with the statute.

The trust document will be reviewed by the Social Security Administration and, because of the payback provision, by Medicaid. The standard of review should be the same. However, the state of New Mexico and Social Security have different methodologies.

2. "(d)(4)(C) Trusts"

The second type of safe harbor for a self-settled trust is found in 42 U.S.C.§1396p(d)(4)(C).[13] In this case, if the disabled person transfers her own funds to a non-profit 501(c)(3) organization as trustee, which manages the funds as part of a pooled trust for disabled persons, the transfer is exempt from penalty. The federal statute provides that the trust must be irrevocable; it can be created by the beneficiary as well as by a parent, grandparent, court or guardian; and the statute does not specify a maximum age of the beneficiary. The New Mexico regulations state that people over age 65 who fund a (d)(4)(C) trust may be subject to a transfer penalty. 8.281.510.11 D(1)(d)(iii). Furthermore, New Mexico regulations specify that the non-profit trustee must notify the department in writing in advance of any transactions involving transfers from the trust principal for less than fair market value. 8.281.510.11 D(2)(c).

[12] POMS SI 01120.203.B.1.e specifies that "the person establishing the trust must have legal authority to act with regard to the assets of the individual." It is considered an invalid trust if the parents of a competent adult child create the trust as settlors, and then pursuant to a power of attorney deposit the assets of the child into the trust. Currently there are two solutions to this dilemma. The first is to petition the court for a limited conservatorship specifically for the purpose of transferring the assets of the disabled adult child into the trust. The second is a device created by the Social Security Administration called the "seed trust" or the "$10.00 trust." With this device, the parents deposit $10.00 of their own funds into the trust, thus "establishing" the trust, and then transfer the child's funds into the trust using a power of attorney.

[13] 42 USC 1396p(d)(4)(C) states: **(C)** A trust containing the assets of an individual who is disabled (as defined in section 1382c (a)(3) of this title) that meets the following conditions: **(i)** The trust is established and managed by a non-profit association. **(ii)** A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts. **(iii)** Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c (a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court. **(iv)** To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter.

At the death of the beneficiary, the regulations state that "to the extent that any amounts remaining in the applicant/recipient's trust account upon his/her death are not retained by the trust, the trust pays to the department an amount equal to the total amount of Medicaid benefits paid on behalf of the applicant/recipient." 8.281.510.11 D(1)(d). That this means is that the non-profit organization maintaining the pooled trust can retain the trust balance and use the funds to help other disabled persons who might not have pooled trust accounts.

There are currently four pooled trusts in New Mexico. The ARCA Foundation is the trustee of a pooled trust for the clients of ARCA and other people with developmental disabilities; in Santa Fe, the Knights Templar Foundation is a trustee of a pooled trust to benefit the clients of Easter Seals Santa Maria el Mirador; CARC, Inc. serves as trustee of a pooled trust to benefit its clients in Carlsbad; and The ARC of New Mexico serves as trustee of a pooled trust that can benefit any disabled person who applies to open an account with them, in New Mexico or elsewhere. These pooled trusts have been approved in advance by New Mexico Medicaid.

IV. TRUSTEES OF SPECIAL NEEDS TRUSTS

Trustees of Special Needs Trusts have the same duties as trustees of other trusts, which are to abide by the terms of the trust agreement in the best interest of the beneficiaries, to not waste or squander the trust assets, to be loyal to the beneficiary above all others, and to exercise the level of care of a prudent person. However, trustees of a Special Needs Trust have added responsibilities because of the disability of the beneficiary and the special conditions that apply to distributions from the trust.

A trustee of a Special Needs Trust must develop a working knowledge of the government benefits for which the beneficiary is qualified, because the trustee must understand which distributions are appropriate and which are not. This can mean **not making** certain distributions, such as cash to an SSI beneficiary, as well as **making** other distributions. A Special Needs Trust

trustee must know the long term care plan for the beneficiary, her life expectancy, and what activities are possible or are reasonable to expect. A trustee of a Special Needs Trust should be creative in anticipating activities or items that will enhance the beneficiary's life. For example, a beneficiary who is totally physically disabled, and who requires 24 hour care in a nursing home, but who is not totally mentally disabled, might enjoy a trip to the zoo or to a play.

A Special Needs Trust trustee must understand which distributions would jeopardize the benefits being received. For example, SSI beneficiaries receive cash payments from the Social Security Administration that are deemed to be for the recipients' food and shelter. The receipt of any additional cash, or any item that would be "in-kind support and maintenance," will reduce the monthly SSI benefit, up to a one-third reduction. Therefore, the trustee should not pay the rent for the beneficiary who received SSI without realizing that such a payment may reduce the monthly cash benefit, because that is an in-kind payment for shelter. This is not to say, however, that it might not be prudent for the trustee to pay the rent, even though such payment will result in the reduction of the monthly benefit by one third, because the overall enhancement for the beneficiary might outweigh the reduction in cash.

Although this is not strictly the responsibility of the Trustee, the SSI program requires periodic reporting for all SSI recipients. Eligibility will be denied if the reports are not complete. The existence of the Special Needs Trust must be reported to the Social Security Administration and to Medicaid. Additionally, if the beneficiary changes her address, gets married, obtains more resources or more income, or is no longer disabled, these changes must be reported by the beneficiary to Social Security. The report is due within 10 days of the end of the month in which the change occurs.

The beneficiary or her agent must respond promptly to any notices received from the Social Security Administration or from Medicaid. If notice is given of a change in benefits that

is detrimental to the beneficiary, the beneficiary has 60 days in which to file a written notice of an appeal with Social Security in order to keep the benefits in place during the appeal process. The beneficiary cannot ignore or postpone dealing with the government agency.

Trustees of Special Needs Trusts should also know about other programs or services that might be available to the beneficiary for which the trust could provide or pay for. For example, a trustee should analyze whether purchasing health insurance is feasible or worth doing now that a person with a disability or a pre-existing condition cannot be denied health insurance; or whether to create an ABLE account with a small amount of funds; or whether the beneficiary could qualify for Medicaid expansion under the ACA, which does not have a resource restriction. The trustee should continuously balance the well-being of the beneficiary with the extreme restrictions that come with government benefits, as well as the Medicaid payback at the end of the beneficiary's life.

As with many types of trusts, there is good reason to consider having co-trustees of Special Needs Trusts. If the trust holds significant assets, a corporate trustee may be beneficial for long term investment expertise. However, an appropriate family member could be a co-trustee in order for the day-to-day needs of the beneficiary to be monitored. Trustees of Special Needs Trusts often need ongoing legal representation. To the extent possible, the trustee should stay abreast of changes in the law. We recommend an annual review meeting with the trustee and legal counsel.

V. TAX ISSUES

A. Federal Gift Tax

Generally, gifts of any amount to third party-settled Special Needs Trusts with one beneficiary are taxable gifts. The $14,000 annual exclusion from gift tax rule does not apply to these transfers, because the use of the gift for the beneficiary is postponed into the future. In

trusts other than Special Needs Trusts, this problem is often addressed by the use of "Crummey powers." A notice is sent to a beneficiary by the trustee giving her a right that exists for a limited time to withdraw the gift. The Crummey power converts the gift from a gift of a future interest to a gift of a present interest, thus making it eligible for the annual exclusion. But, because the beneficiary of a Special Needs Trust cannot be given the authority to demand withdrawal of any amount from the trust at any time, Crummey powers should not be given to her.

One way to solve this problem is to include other family members of the beneficiary as beneficiaries of the trust, with the limitation that if the disabled family member is receiving means-based government benefits, then the corpus of the trust is first to be used for the special needs of the disabled family member. This creates potential donees of the Crummey powers only for the purpose of transferring non-taxable gifts into the trust.

The third party-settled trust can be structured as a grantor trust, which keeps the transfers into the trust from being completed, and therefore, taxable gifts. The grantor is treated as the owner of the trust for income tax purposes. This can be accomplished in several ways. A simple method is to name the grantor as trustee, so that she will retain the power to direct disposition and enjoyment of the trust. An additional method is to give the grantor a testamentary limited power of appointment over the trust.

Self-settled Special Needs Trusts are grantor trusts, because the beneficiary is deemed to be the grantor even though she may not be the formal grantor of the trust. Therefore, a transfer to a self-settled trust by the beneficiary is not a gift at all.

By statute, annual gifts to ABLE accounts are gifts of a present interest and are not taxable gifts.

B. Federal Estate Tax

A third party-settled Special Needs Trust will not be included in the federal taxable estate

of the grantor if the third party donor makes a completed gift to the trust. The third party-settled trust is not includable in the federal estate of the beneficiary, because the beneficiary does not have sufficient control over the trust fund to warrant inclusion, unless the beneficiary is given a general testamentary power of appointment over the trust. There is no reason why a third party-settled trust should not include generation skipping transfer tax exemption planning, especially if it is believed that there will be a large amount of corpus left over after the death of the beneficiary, which will pass to other family members and grandchildren.

The self-settled Special Needs Trust will be included in the beneficiary's federal taxable estate, because of the beneficiary's retained interest. However, the Medicaid payback provision may significantly reduce the value of the trust fund, if not eradicate it altogether. Furthermore, careful planning by the trustee can result in distributions from the trust being sufficient to reduce the corpus to avoid federal estate tax as well as to reduce the Medicaid payback.

C. Fiduciary Income Tax

A third party-settled Special Needs Trust which is not a grantor trust should be assigned its own taxpayer identification number. It will file an income tax return for each calendar year, which is due on April 15 of the following year. While the trustee is prohibited from distributing cash directly to the beneficiary, fiduciary income tax rules require that the trustee report as distributable net income the value of all distributions from the trust up to the amount of the net taxable income of the trust for that year. For example, if the trustee distributes funds for the purchase of a vehicle, which is titled in the beneficiary's name, this is an acceptable distribution of funds for an exempt resource. It will not disqualify the beneficiary from SSI or Medicaid as a distribution of income. However, to the extent that the trust had earnings, the distributable net income rules require that the trust report those earnings up to the amount distributed for the value of the vehicle as having been distributed to the beneficiary as income on a Schedule K-1. The

beneficiary will report the income on her individual income tax returns, even though she did not receive the income in the form of cash. The trustee can pay the cost of preparation of the income tax returns and can pay any income tax due directly to the taxing jurisdiction.

A Special Needs Trust is a complex trust, meaning that the Trustee has discretion to distribute income or principal. If the trust retains income, the trust will be the taxpayer for that taxable income. A complex trust may take only a $100 exemption against its taxable income. The Internal Revenue Code provides an exception for some Special Needs Trust beneficiaries. 26 USCA section 642(b)(2)(C)(i),(ii). This statute was passed as a part of the Victims of Terrorism Tax Relief Act of January, 2002. It provides for a higher tax exemption if the trust is what is defined as a Qualified Disability Trust ("QDT"), that is, one that is established solely for the benefit of an individual under 65 who is disabled. A trust is a QDT even if a remainder beneficiary is not disabled. For a trust that meets the definition of a QDT, the exemption that is allowed for the trust is the allowable personal exemption for the individual beneficiary. In 2015, the personal exemption is $4,000. Therefore, if a QDT retains $5,000 of earned income, after taking the exemption amount, it will report $1,000 taxable income in 2015, and pay income tax in a 15% bracket in the amount of $150. A complex trust that was not a QDT will have only a $100 exemption, and thus will report $4,900 taxable income and pay $975 in tax going up from a 15% bracket to a 25% bracket.[14]

[14] ***2015: If Taxable Income Is:*** ***The Tax Is:***

Not over $2,500	15% of the taxable income
Over $2,500 but not over $5,900	$375 plus 25% of the excess over $2,500
Over $5,900 but not over $9,050	$1,225 plus 28% of the excess over $5,900
Over $9,050 but not over $12,300	$2,107 plus 33% of the excess over $9,050
Over $12,300	$3,179.50 plus 39.6% of the excess over $12,300 + 3.8% Medicare Surtax

In 2013, the Affordable Care Act added a 3.8% Medicare surtax on unearned income taxed at the 39.6% bracket. Therefore, non-grantor Special Needs Trusts with taxable income of more than $12,300 in 2015 will also be liable for the surtax. The American Taxpayer Relief Act of 2013 ("ATRA") increased the capital gain tax rate to 20% for trusts with income above $12,300 in 2015.

If a third party-settled trust is a grantor trust, it does not need to have a tax identification number different from the grantor, and the income will be deemed to be distributed and taxable to the grantor. One advantage of a third party settled Special Needs Trust being a grantor trust is that the grantor, who is often a close family member of the disabled beneficiary, can effectively give more to the beneficiary by paying the income taxes on the earnings of the trust.

Self-settled Special Needs Trusts are grantor trusts, and therefore, do not need to be assigned a separate taxpayer identification number, but use the Social Security number of the beneficiary. The income and expenses of the trust are reported on the beneficiary's individual income tax returns. In spite of this reality for income tax purposes, it is not uncommon for a different tax identification number to be assigned to a d(4)(A) trust, because the agencies providing the benefits may not understand that the trust is a separate entity from the beneficiary, and irrevocable, if it uses the Social Security number of the beneficiary.

VI. CONCLUSION

In the United States today, a permanent total disability brings with it economic peril. A person who is born with autism, or who suffers from Alzheimer's, or who has a spinal injury, must address both the critical medical treatment required as well as the loss of economic self-sufficiency. Medical care is extraordinarily expensive and ongoing. Although the ACA and Medicare provide access to health insurance for disabled individuals, many disabilities necessitate

special housing, transportation and education, which are not covered by health insurance. While many private charities provide worthwhile services, the enormous cost of caring for persons with permanent disabilities in this country is necessarily borne primarily by the government. However, maintaining eligibility for government programs often contradicts the efforts of family members to provide support and care for their loved ones. Special Needs Trusts and ABLE accounts can provide mechanisms for sheltering resources to benefit disabled family members so that these contradictory efforts can be harmonized. A well-managed support system using these types of accounts can maximize the use of government-provided services while supporting the family's care and enhancing the comfort and enjoyment of life for the disabled beneficiary.

SUMMARY OF ABLE ACT

Federal ABLE (Achieving a Better Life Experience) Act-
New Mexico Accounts for Persons with Disabilities Act

In December, 2014, Congress passed a federal law authorizing ABLE accounts that allow certain individuals with disabilities to save money that can be used for disability-related expenses without losing eligibility for Medicaid, Supplemental Security Income (SSI), and other public programs. Each State must authorize accounts in that state, and the New Mexico Legislature did so in 2016. The Governor signed the bill in March, 2016.

Why would a person want an ABLE account?

- Many people with disabilities rely on public programs for help with income, housing, health care, and food. To qualify for these programs, an individual generally must have a low monthly income and no more than $2,000 in countable assets, which means that they must remain poor in order to qualify. The ABLE Act allows an individual to save more than the usual asset limit and to use those savings to pay for expenses related to his or her disability, while keeping eligibility for these important benefits.

Who can have an ABLE account?

- The person must have a disability (of any type) that began before age 26. The person does not have to be under 26 to have an account.
- If the person is receiving SSI or SSDI (Social Security Disability Income) benefits, he or she is automatically eligible to have an ABLE account. If the individual is not receiving SSI or SSDI, a certification must be submitted that the individual meets the disability criteria and there is a signed diagnosis from a physician regarding the individual's impairments. The medical records do not have to be submitted themselves unless requested.
- An individual may have only one ABLE account.

Does a person have to be a resident of New Mexico to have an ABLE account here? Can a New Mexico resident have an account in another state?

- The original federal bill required that the account had be set up in the state where the person resides, but it was amended in December 2015. Eligible individuals now may have an account in any state that has established an ABLE program. This means that the person on whose behalf the account is set up here need not be a resident of New Mexico, and qualified New Mexicans can choose to set up an ABLE account in another state that has authorized these accounts.

Who can contribute to an ABLE account?

- Anyone can contribute to the account for the benefit of the individual. The owner of the account is the disabled person, who is the "beneficiary" of the account. A Conservator may act on behalf of the beneficiary.

How much money can be saved in an ABLE account?

- Up to $14,000 can be contributed to an ABLE account each year. More than one person can contribute, but the total amount from all sources is limited to $14,000 a year. The maximum will be adjusted annually for inflation.
- The total amount that can be saved in an ABLE account will vary from state to state. However, amounts over $100,000 will be counted as resources for SSI, and monthly cash benefits will be suspended while the account exceeds that amount. Medicaid eligibility will not be affected even if the account has over $100,000. In New Mexico, unless the beneficiary is receiving SSI, the account can hold a maximum of $294,000.

What are qualified expenses that may be paid with funds from an ABLE account?

- Qualified disability expenses are expenditures related to the beneficiary's disability. The statutes list the following as qualified disability expenses: housing; education; transportation; assistive technology; personal support services; employment training and support; health, prevention and wellness; financial management and administrative services; legal fees; and funeral and burial expenses.
- No prior approval is needed before expenditures are made. However, documentation must be kept that shows the expense was a qualified one.

Is tax owed on income earned by the account or on money distributed from the account for qualified expenses?

- Income earned by the account is not taxed.
- Distributions from the account for qualified expenses do not count as taxable income to either the beneficiary or the person who contributed to the account.

What happens to the account when the beneficiary dies?

- The state that provided any Medicaid services can claim money that is left in the account to repay it for expenditures made for the person after the account was set up. Anything left in the account after that goes to the beneficiary's estate.

Who will administer the accounts in New Mexico?

- The State Treasurer's Office will establish the program, including issuing regulations to govern the program. The New Mexico statute provides that the Treasurer may contract with an outside entity to administer the accounts.

Is the state responsible if the account loses value?

- No, the new state law specifically says that the state is not liable for any losses.

Is an ABLE account the same as a special needs trust?

- No, ABLE accounts are entirely accessible by the beneficiary and will be less expensive to set up than a stand-alone special needs trust, but no less expensive than a pooled special needs trust account. There is no Trustee of an ABLE account.
- A person can have one ABLE account and several special needs trusts.

When will ABLE accounts become available in New Mexico?

- The State Treasurer's Office is expected to have established the framework to create accounts in New Mexico later this year or in 2017. The interim Legislative Health and Human Services Committee has put this on its work plan for 2016. Accounts may be available sooner in other states.

[With thanks to the Disability Coalition, a project of Disability Rights of New Mexico]

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WASHINGTON, D.C. 20301-4000

MANPOWER AND
RESERVE AFFAIRS

DEC 3 1 2015

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY FOR HUMAN RESOURCES
DEPUTY ASSISTANT SECRETARY OF THE NAVY FOR MILITARY PERSONNEL POLICY
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE FOR FORCE MANAGEMENT AND PERSONNEL
DIRECTOR, DEFENSE FINANCE AND ACCOUNTING SERVICE

SUBJECT: Enabling Payment of Survivor Benefit Plan Annuities to a Special Needs Trust

This memorandum establishes the policy required for implementing section 624 of the Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (FY 15 NDAA), Public Law 113-291, which amends title 10, United States Code (U.S.C.), sections 1448, 1450, and 1455. The amendments allow a person who has established a Special Needs Trust (SNT) in accordance with either title 42, U.S.C., section 1396p(d)(4)(A) or (C), to direct payment of a dependent child Survivor Benefit Plan (SBP) annuity directly to the SNT as an add-on election to a member or retiree's SBP election for coverage of a dependent child.[1] In general, members entitled to receive retired pay make an irrevocable decision when they elect to provide SBP coverage for a beneficiary.

The FY 15 NDAA gives military members and retirees the option to direct payment of a SBP annuity for a dependent child to a SNT for the benefit of a disabled child when they elect or elected coverage for that dependent child as a SBP beneficiary (the statute does not apply to disabled spouses). Generally speaking, a SNT is a legal instrument specifically designed solely for the benefit of a person with a disability by providing a set of instructions for managing money set aside to help a disabled person. Unlike many other types of trusts, a SNT is governed by State law. In accordance with the SBP statute, a SNT must also be in accordance with Federal statute (i.e., title 42, U.S.C., section 1396p(d)(4)(A) or (C)). In addition, once created, it must be irrevocable.

As a result of the legislation, a member or retiree who elects SBP coverage that includes coverage for a dependent child may now, at any time, irrevocably decide to substitute a SNT created for the benefit of a disabled dependent child as the SBP beneficiary to receive any SBP annuity payments that would otherwise be payable to or on behalf of the disabled dependent child. This irrevocable decision may be made during the life of the member through a written statement that designates future SBP payments to the SNT (designation in Section X- Remarks of the DD Form 2656 Data for Payment of Retired Personnel will also suffice). In situations

[1] Hereinafter the term "dependent child" means a dependent child as defined in 10 U.S.C. § 1447(11). The dependent child must also be "disabled" as defined in 42 U.S.C. § 1382c(a)(3) (e.g., unable to engage in any substential gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months). Thus, a "disabled dependent child" means a child is who is a dependent child pursuant to 10 U.S.C. 1447(11) and "disabled' pursuant 42 U.S.C. § 1382c(a)(3).

where SBP payments are made to more than one dependent child, the SNT shall be treated as a dependent child for purposes of determining the shares payable to each of the children.

1. During the life of the member or retiree. A member or retiree who elects or elected SBP coverage that includes coverage for a dependent child may designate a SNT created for the benefit of the disabled dependent child to receive SBP payments that would otherwise have been payable to the disabled dependent child. To irrevocably elect to substitute a SNT for the benefit of a disabled dependent child as a SBP beneficiary in lieu of the dependent child, the member or retiree must submit a statement of the decision to have the annuity paid to the SNT with the name and tax identification number for the SNT. Further, the member or retiree must either submit a separate statement using the attached template from an actively licensed attorney certifying that the trust is a SNT created for the benefit of the disabled dependent child and is in compliance with all applicable Federal and State laws or a certification from the Social Security Administration that the trust qualifies as a SNT pursuant to title 42 of the U.S.C.

2. Upon or after the death of a member or retiree.

a. Upon the death of a retiree. If SBP coverage for the dependent child has been elected, then the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian may irrevocably elect to have SBP annuity payments made to a SNT established for the disabled dependent child by the member, or the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian.

b. Upon the death of a member on Active Duty in the line of duty. If SBP coverage for the dependent child has been elected by the Secretary concerned due to a member's death on Active Duty while in the line of duty, then a disabled dependent child's surviving parent, grandparent, or court appointed legal guardian may irrevocably elect to have SBP annuity payments made to a SNT established for the disabled dependent child by the member, or the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian.

c. Upon the death of a member during inactive duty training. If a member dies during inactive duty training and leaves no surviving spouse and the SBP becomes payable to the surviving dependent children, then the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian may irrevocably elect to have SBP annuity payments made to a SNT established for the disabled dependent child by the member, or the disabled dependent child's surviving parent, grandparent, or court appointed legal guardian.

d. Requirements for a qualifying SNT designation under 2.a.-c. To make this SNT designation under paragraphs 2.a.- c., the surviving parent, grandparent, or court-appointed legal guardian shall submit a statement of the decision to have the annuity paid to the SNT with the name and tax identification number for the SNT, and a separate statement using the attached template from an actively licensed attorney certifying that the trust is a SNT created for the benefit of the disabled dependent child and is in compliance with all applicable Federal and State laws or certification from the Social Security Administration that the trust is a SNT pursuant to title 42 of the U. S.C.

If the SNT is found to be invalid or otherwise fails, then payment of the SBP annuity shall revert back to being made directly to the dependent child. If this occurs, the dependent child's entitlement to other Federal benefits such as Supplemental Security Income and Medicaid may be impacted. Since there are serious consequences if a SNT is found to be invalid, those seeking to have a SNT created need to exercise due diligence to ensure that they consult with an attorney well-versed in this specialized and complex area of law.

This policy and operational guidance will be included in subsequent updates of the Department of Defense Financial Management Regulation Volume 7B and the Survivor Annuity Program Administration, Department of Defense Instruction 1332.42. Further, this policy regarding the use of SNT supplements currently existing SBP policy, which otherwise remains in effect. If you have any questions, my point of contact is Pat Mulcahy at (703) 693-1059.

Stephanie Barna
Principal Deputy Assistant Secretary of
Defense (Manpower and Reserve Affairs),
Performing the Duties of the Assistant
Secretary of Defense (Manpower and
Reserve Affairs)

Attachment:
As stated

cc:
Deputy Assistant Secretary Defense for
Military Personnel Policy)
Deputy Chief of Staff for Personnel, U.S. Army
Deputy Chief of Naval Operations
for Manpower, Personnel, Training and
Education, U. S. Navy
Deputy Chief of Staff for Personnel, U.S. Air Force
Deputy Commandant for Manpower and
Reserve Affairs, U.S. Marine Corps
Assistant Commandant for Human Resources,
U.S. Coast Guard
Director, Division of Commissioned Personnel,
U.S. Public Health Service
Director, National Oceanic and Atmospheric
Administration Corps Operations-NC
Department of Defense Chief Actuary
Deputy General Counsel (Fiscal)

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